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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

R. R. HENSLER,

Petitioner,

vs.

CITY OF GLENDALE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

May the California Supreme Court nullify four recent holdings of this Court, through the expedient of ruling that in a case of regulatory taking of 120 acres of land (by an ordinance expressly forbidding the creation on it of any private "man-made features" whatsoever), the landowner must go through *five* costly, protracted, redundant and pointless administrative and judicial proceedings, as a precondition to securing just compensation under the Fifth Amendment?

More particularly,

(a) In spite of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 104, 319-22 (1987), and *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95, (1985), holding that as a matter of constitutional law plaintiff-landowners may not be compelled by state law to await the outcome of remedial administrative and judicial proceedings before seeking just compensation in an inverse condemnation action, may the state court nonetheless require them to do just that?

(b) In spite of *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798, 808-11 (1992), holding that a plaintiff-landowner who has suffered a regulatory taking of his or her property may concede the validity of the regulation and sue directly in inverse condemnation, may a state court nonetheless forbid such concessions and require the plaintiff to go through the idle ceremony of attacking the regulation's validity in five separate administrative and

judicial proceedings, before an inverse condemnation trial, even though the regulation is valid and conceded to be valid?

(c) In spite of *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) and *First English*, 482 U.S. at 312-13, holding that whether a regulation is valid and whether it works a constitutional taking are "separate question[s]," may a state court nonetheless hold that the confiscatory effect of the regulation goes to the single question of validity, and on that contrived basis require that the regulation's "validity" as so ingeniously defined, be first litigated in multiple administrative and judicial proceedings, even though the regulation is promulgated under a valid statute and is concededly valid?

(d) Is it a denial of just compensation, in violation of the Takings Clause of the Fifth Amendment, as well as a denial of due process to victims of uncompensated takings, to so burden their access to courts by such multiple, costly, protracted, and redundant five-fold procedures as to put the constitutionally mandated just compensation relief beyond the reach of almost all constitutionally aggrieved citizens, save possibly only a few extremely wealthy individuals capable of carrying the enormous economic burdens of such litigation?

II

Are state courts free, in structuring remedial procedures in uncompensated takings cases, to rely on the assertedly limited financial condition of their regulatory entities (as compared to the Federal Government) as a

constitutionally legitimate reason for avoiding their constitutional duty to pay just compensation for property taken by them? Put another way, does the degree of required obedience to the mandate of the Just Compensation Clause vary with the affluence of the regulating entity?

III

(a) Is it a denial of due process for the California Supreme Court (a) to hold in 1979 in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979) (*Agins I*), *aff'd on other grounds*, 447 U.S. 255 (1980), that inverse condemnation does not lie as a remedy for regulatory takings, and then (b) after being overruled by this Court in 1987, in *First English*, assert in the case at bar that in the interim the statute of limitations has run on such actions, even though between 1979 and 1987 while *Agins I* was law, an inverse condemnation action could not have been brought, as California courts clearly and repeatedly held at the time?

(b) *A fortiori*, is it also a denial of due process for the California Supreme Court to deny retroactively that it had precluded inverse condemnation recovery in *Agins I*, when it plainly did, and to question whether its *Agins I* decision was overruled by this Court in *First English* when it plainly was? If the court below is correct in so asserting, then what — if anything — does this Court's decision in *First English* stand for in California?

PARTIES TO THE PROCEEDING

Petitioner R. R. Hensler was plaintiff and appellant below. Respondent (defendant and respondent below) is the city of Glendale, a California municipal corporation.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

R. R. HENSLER,
Petitioner,
vs.
CITY OF GLENDALE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

R. R. Hensler respectfully seeks certiorari to review the judgment of the California Supreme Court.

OPINIONS BELOW

The opinion of the California Supreme Court, ("the Opinion") published at 8 Cal. 4th 1, 32 Cal. Rptr. 2d 244, 876 P.2d 1043, is reproduced as Appendix A1-37, and the order modifying the opinion and denying rehearing as Appendix B1-3. The Opinion affirms the March 3, 1993 opinion of the California Court of Appeal published at 23 Cal. App. 4th 1100, 17 Cal. Rptr. 2d 99 (Appendix C1-11). The denial of a rehearing by that court appears as Appendix D. That intermediate appellate decision in turn affirmed an order of the Los Angeles County Superior Court (Appendix E1-2)

sustaining the City of Glendale's demurrer without leave to amend.

JURISDICTION

This is an inverse condemnation action for deprivation of property without due process of law or just compensation in violation of the Fifth and Fourteenth amendments to the United States Constitution.

The California Supreme Court entered judgment on July 25, 1994, and denied a timely petition for rehearing on September 22, 1994. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law."

City of Glendale Municipal Code, Part 8, Chapter 28, Article I, Section 28-2.1 (1981) is quoted in the Court of Appeal opinion *Hensler v. City of Glendale*, at 23 Cal. App. 4th 1100, 1103 n.2 and reproduced herein at Petitioner's Appendix C3.

STATEMENT OF THE CASE

A. The City's Ordinance Prohibiting Outright Any "Man-Made Features" On Private Ridgeline Land Converted — Without Compensation — Approximately 120 Acres Of Petitioner's Land Into A Public Preserve

Beginning in 1978, Petitioner Robert R. Hensler sought to develop his 300-acre parcel of land, consistent with the City's general plan and existing single family residential zoning. App. A3; 8 Cal. 4th at 8.

In March, 1981, the City adopted an ordinance which forbade "all man-made features"[1] on major ridgelines as Glendale Municipal Code, Part 8, Ch. 28, Art. I, Sec. 28-2.1, Ordinance No. 4533 ("the Ordinance"). App. C3; Clerk's Transcript (CT) 2:25-3:4, 6-8.

Between July, 1983 and July, 1984, Petitioner submitted three successive development plans, each proposing a lower density than the previous plan. Each proposal was rejected. Finally, on April 1, 1986, the City approved a 588-unit Planned Residential Development on a part of his land (downsized from the third proposal). App. A4; 8 Cal. App. 4th at 8; CT 3. At all stages of this process, he was told that no development whatsoever would be allowed under any circumstances, on approximately 40% (some 120 acres) of the property

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[1] An exception allows only (a) *public* roads where alternative routes are not feasible, and (b) improvement of already existing *public* utilities. The prohibition against private improvements or "features" is absolute, so that no private improvement whatever can be created on the subject privately owned 120-acre tract of land.

("the Affected Land"), which was within the ridgeline classification of the Ordinance. (CT 3)

B. Procedural History

1. The Trial Court And Court Of Appeal Sustained The City's Confiscatory Ordinance

In September, 1989,[2] Petitioner sued, alleging a taking of the Affected Land. App. A4; 8 Cal. App. 4th 8. Petitioner did not challenge the validity of the Ordinance; he only contended that it worked a taking of the Affected Land. App. A5; 8 Cal. 4th at 9.

The City demurred to the complaint claiming that (1) it failed to state a cause of action and (2) that the action was barred by the 90-day limitations period in Government Code section 66499.37 (contained in the California Subdivision Map Act)[3] which establishes 90 days in which to sue to attack, review, set aside, void or annul the decision of government bodies concerning subdivisions and decisions relating to it. See App. A4; 8 Cal. 4th at 8.

The City argued that an inverse condemnation action had to be preceded by a petition for an administrative writ of mandate to hold the ordinance invalid, and this

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[2] Petitioner sold his interest in the Property in 1986, but under California law retains his right to just compensation. *City of Los Angeles v. Ricards*, 10 Cal. 3d 385, 389 (1973). This is also federal law; *see New Port Largo v. Monroe County*, 985 F.2d 1488, 1494 (11th Cir. 1993), *cert. denied*, 126 L. Ed. 2d 373 (1993), *on remand*, 856 F. Supp. 659 (S.D. Fla. 1994).

[3] Except as otherwise clear from context, all statutory citations are to California codes.

petition had to be filed within 90 days of the enactment of the Ordinance. Petitioner contended that the Ordinance was valid (though confiscatory) so there was no point in pursuing a writ of mandate, and that he filed his suit within the controlling 5-year limitations period.[4]

The trial court — required to assume the truth of the allegations in Petitioner's complaint — sustained the demurrer on both grounds without leave to amend, and dismissed the action. The court of appeal affirmed on the limitations ground. App. C; 23 Cal. App. 4th 1100 (1991); 8 Cal. 4th at 8-9. The California Supreme Court granted review.

2. In An Opinion Reaching Beyond The Issues Presented, The California Supreme Court Established Multiple Procedural Barriers Between A California Citizen And The Constitutional Right To Just Compensation, Which Are Inconsistent With The Teachings Of This Court

The California Supreme Court also affirmed. But, reaching beyond the tendered issues, and expressly deciding federal constitutional questions, the court unveiled a grand scheme for constitutional challenges to confiscatory land use regulations. App. A1-37; 8 Cal. 4th 1. It created a process so expensive and protracted — requiring no less than five or six separate administrative and judicial proceedings before an award of just

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[4] *See Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 867 (1985), *cert. denied*, 475 U.S. 1017 (1986).

compensation can be secured — that it effectively forecloses award of just compensation from California courts to a vast majority of constitutionally aggrieved citizens.

The Opinion held — in direct contradiction of *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) — that pursuit of available administrative remedies and appeals, followed by pursuit of *nonmonetary* judicial remedies (*i.e.*, the filing of a petition for a writ of mandate in court, attacking the validity of a confiscatory ordinance prior to the institution of an action for damages) would now be mandatory. App. A11-24; 8 Cal. 4th at 13-21.

REASONS WHY THE WRIT SHOULD ISSUE

A. Summary of Argument

The law of remedies for regulatory takings was clarified by this Court in 1987, in *First English v. Los Angeles County*, 482 U.S. 304, 319 (1987). Ending a decade of contentious litigation, this Court held that (a) just compensation — not mere invalidation of the confiscatory regulation — was the remedy required by the Takings Clause and (b) the right to seek just compensation could not be deferred until after the regulation effecting the taking was first declared invalid. 482 U.S. at 319, 322.

Even before *First English*, *Williamson County* held that while a landowner claiming a regulatory taking by confiscatory land-use regulation may be required to secure a "final administrative act" from the regulatory body, so that the courts can tell whether the regulation goes "too far," such an owner is *not* required to pursue either administrative appeals or nonmonetary judicial

remedies before suing for just compensation. 473 U.S. at 193.

Thereafter, this Court further held in *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798, 808-11 (1992), that such landowner may concede the regulation's validity and sue directly in the state courts for just compensation; he or she may not be turned away by a state court on the grounds that absent a challenge to the regulation's validity, the inverse condemnation case could not proceed.

But the California Supreme Court has *de facto* overruled the *Williamson County-First English-Lucas* line of authority. Aggrieved Californians must now engage in a chain of redundant "remedies" that *Williamson County* held *not* to be required. The immediate fallout of this development that retroactively prejudiced Petitioner's rights, is the ingenious notion that inasmuch as he was supposed to pursue a mandate procedure first, the 90-day limitation period on writ petitions applied, and retroactively cut off his normal statutory 5-year period for inverse condemnation actions. Thus, what this Court plainly held in *First English* California could not do, it has done anyway by manipulating the state law of remedies.

Petitioner has been told below that his "remedy" for the regulatory taking of his 120 acres of land was to seek a writ of mandate back in 1981, to challenge the "validity" of a plainly valid ordinance, and afterwards to sue in inverse condemnation — *even though in 1981 an inverse condemnation action on his part was not permitted* under *Agins v. Tiburon*, 24 Cal. 3d 266 (1979) (*Agins I*), *aff'd on other grounds*, 447 U.S. 255 (1980), which was not overruled by this Court until 1987.

Remedial intervention by this Court is thus urgently needed, lest the confusion of the past decade be revived.

If California is permitted thus to frustrate the holdings of this Court, a clear invitation will be sent to other states that it is permissible to do likewise, with adverse effects on the Bill of Rights.

B. The Case At Bar Is *Agins I* Redux: An Attempt To Accomplish Indirectly What This Court Has Precluded California From Doing Directly, Namely So Burden The Availability Of Just Compensation As The Remedy For Regulatory Takings, As To Make It De Facto Unobtainable

1. This Case Is Based On The Same Unsound Policy Considerations, And Erects The Same Obstacles To Recovery Of Just Compensation Under The Fifth Amendment As The Overruled *Agins I* Decision

In *Agins I*, the California Supreme Court held that a landowner's sole remedy against a confiscatory land-use regulation was its invalidation by a court:

> We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it

> is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, *he may not recover damages on the theory of inverse condemnation. Id.*, 24 Cal. 3d at 269-70 (emphasis added).

The stated policy underlying this radical ruling was to preserve "freedom in the land-use planning function" without having to face the "inhibiting financial force which inheres in the inverse condemnation remedy." *Id.* at 276. But in 1987, this Court disagreed in *First English* (481 U.S. at 317, 319) and held the award of just compensation for a regulatory taking could not be deferred until after the confiscatory regulation is first declared invalid. *Id.* at 320.

But the intended corrective did not correct. In the seven years following the *First English* opinion:

- the Supreme Court of California, the nation's most populous, most litigious and probably most intensely regulated state, did not issue a single opinion speaking to the regulatory taking issue that was being fiercely litigated in the lower courts;[5] and
- not a single reported California decision affirmed or required payment of just compensation for such takings.

And then came the case at bar. Precluded by *First English* from simply denying damages, the California

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[5] *See* Berger, *Silence at the Court: The Curious Absence of Regulatory Taking Cases From the California Supreme Court Jurisprudence*, 26 Loyola L.A. L. Rev. 1133 (1993).

Supreme Court — with all due respect — rewrote history and created procedural barriers of such complexity and magnitude as to preclude all but the most alert, patient and wealthy Californians from ever presenting the merits of their claim to a state court of competent jurisdiction. To do so in California now requires no less than five (or perhaps six) separate administrative and judicial proceedings. Enforcement of the Takings Clause has become functionally and economically prohibitive.

The Opinion produces a sense of *deja vu.* The erroneous policy of *Agins I* is even more pronounced here. This Court's choice of a contrary policy in *First English* (482 U.S. at 321-22) is simply ignored. And, in an almost breathtaking display of bravura, the California court deconstructed the decisional law and history of takings law laid down by this Court, as well as its own history, in an attempt to support its holding.

2. The Primary Requirement Of A Challenge To The Validity Of An Offending Regulation By A Petition For A Writ Of Mandate Is Contrary To *Williamson County* And *First English*, And Serves No Useful Purpose Where, As Here, Validity Is Plain And Conceded, as in *Lucas*. This Requirement Burdens Lower Courts With Having To "Decide" A Non-Issue, Adds Significant Delay And Expense, Interposes A Harsh 90-Day Limitations Period, Invites Municipal Gamesmanship And Promotes Injustice

The Opinion's ostensible justification for requiring the full panoply of administrative remedies and appeals, plus a judicial petition for a writ of mandate challenging the validity of the plainly valid offending regulation (see *post*, pp. 14-16), is that notwithstanding the Constitution's Just Compensation mandate, "[i]t leaves to the state . . . the procedures by which compensation may be sought." App. A11; 8 Cal. 4th at 13. But this assertion, correct in the abstract, defies *First English* and *Lucas* in the context at bar.[6] *See Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (matters that are primarily the concern of

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[6] The California Supreme Court apparently overlooked that these two cases *were state court cases* and thus the constitutional limitations on procedures and remedies laid down by this Court were addressed to state courts.

states, must nonetheless be dealt with consistently with federal constitutional requirements).

Morever, the state prerogative to fix remedies may not create procedural roadblocks that chill the assertion of constitutional rights; that is a denial of due process. *See Planned Parenthood v. Casey*, 505 U.S. __, 120 L. Ed. 2d 674, 714-15 (1992); *Zablocki v. Redhail*, 434 U.S. 374, 386-88 (1978); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); Brownstein, *How Rights Are Infringed: The Role Of Undue Burden Analysis In Constitutional Doctrine*, 45 Hastings L.J. 867 (April 1994). So it is here.

More importantly, in *First English*, as a matter of "black letter law" directed specifically to California courts, this Court explicitly rejected the argument that an aggrieved Californian should not be able to recover just compensation until it is "finally determined" in a writ proceeding that the regulation constitutes a "taking" of property. 482 U.S. at 306-07. Also, in *Williamson County*, this Court held that a landowner must first "seek compensation through the procedures the state has provided for doing so," *but need not seek nonmonetary remedies*. 473 U.S. at 194-95. But California has turned that law topsy-turvy, and now requires the beleaguered plaintiff not only to "seek compensation;" he or she must first "seek invalidation" — precisely what *Williamson County* holds need *not* be done. A California landowner — says the court below — may not even concede validity as did the plaintiff-landowner in *Lucas*, with this Court's approval (120 L. Ed. 2d at 808). App. A13; 8 Cal. 4th at 13-14.[7]

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[7] This Court has consistently recognized in its constitution-based takings jurisprudence that compensation, not invalidation, is the remedy of first instance. *See, e.g., Presault v. Interstate Commerce*

(continued)

The ostensible reason offered below for all this is to "afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking." App. A12; 8 Cal. 4th at 13. But, with respect, this rationale is bogus. A public entity in California has *always* had the right to modify its conduct in response to a finding of liability in an inverse condemnation lawsuit or otherwise, and limit its financial exposure accordingly. *See City of Los Angeles v. Ricards*, 10 Cal. 3d 385, 389-90 (1973) (city restored access to subject property after finding of inverse condemnation liability, thereby reducing damages to nominal); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 125-26 (1973) (city was free to change its regulation after losing in court). Indeed, it was precisely California's historical practice of thus allowing its regulatory entities to change their offending regulations as they pleased — even after an adverse judgment — that appeared to be a motivating factor in this Court's decision to opt for just compensation as the primary remedy in regulatory takings cases.[8]

(fn. continued)
Comm'n, 494 U.S. 1, 12 (1990); *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Hurley v. Kincaid*, 285 U.S. 95, 104 n.3 (1932). This Court has stressed that the "strongest reasons of public policy" militate against a court exercising "its compulsive powers" to stop government "in its tracks" when legislation can be preserved through a compensation remedy. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

[8] See the (nominal) dissent of Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n.22 (1981):

> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At

(continued)

In sum, after the decision below, a Californian complaining of an uncompensated regulatory taking must go through *all* of the following:

First, seek a permit or other land-use entitlement, to produce a "final administrative act" as required by *Williamson County*.

(fn. continued)
the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney [James T. Longtin, author of the widely used treatise *Longtin's California Land Use* (Local Gov't Publications, 2d ed. 1987)] gave fellow City Attorneys the following advice:

> *"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.*
>
> "If legal preventative maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 C3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again." (Emphasis in the original.)

While labeled a "dissent," the Brennan opinion in *San Diego Gas & Electric* drew substantive support from five justices (Justices Marshall, Stewart and Powell, who joined him, as well as Chief Justice Rehnquist, who wrote in a separate opinion concurring with the five-justice majority on procedural grounds, but agreeing with the substance of the dissent). The Brennan opinion thus was widely regarded as expressing the substantive views of the court (an assumption verified by *First English*).

Second, pursue to exhaustion *all* administrative remedies, and administrative appeals, even though *Williamson County* was explicit that this is not required (473 U.S. at 193).[9]

Third, seek a variance.[10]

Fourth, sue for a writ of mandate in the state courts within 90 days:

(a) to secure an administrative writ of mandate to show (if he or she can) the invalidity of the regulation and if valid, and

(b) to demonstrate the regulation's "invalidity" in the newly contrived sense that though valid, the regulation works a taking.[11]

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[9] This in spite of the fact that as *Williamson County* admonished, such a requirement would create a head-on conflict with *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

[10] The variance requirement was endorsed by *Williamson County* because there the ordinance in question specifically provided for one. 473 U.S. at 187-89. But in California, so-called use variances (i.e., variances for uses other than those specified in the zoning ordinance) are prohibited by statute (Gov't Code §65906; *see Herrington v. Sonoma County*, 857 F.2d 567, 570 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989)). Moreover, under California decisional law the variance procedure, even when permitted, applies only to small parcels, not this 120-acre tract. Thus to tell this Petitioner to seek a variance, is to tell him to perform an act that the court below itself held to be inappropriate — *see Topanga Ass'n for a Scenic Community v. Los Angeles County*, 11 Cal. 3d 506, 510 (1974) (even a 28-acre parcel may be too large for a variance).

[11] This requirement defies this Court's teaching that the question whether a regulation is valid and whether it works a taking notwithstanding its validity are "separate question[s]." *See First English*, 482 U.S. at 312-13, and *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979). *See also Agins II*, 447 U.S. at 260 (taking can result *either* from an invalid regulation *or* from the harsh impact of a valid regulation).

Fifth, sue in inverse condemnation

(a) to obtain a bench ruling as to inverse condemnation liability, then

(b) if liability is found, try the compensation claim to a jury as required by Cal. Const. art. 1, §19.

The above summary is optimistic. It does not reflect the interminable delays in administrative appeals that are a staple of the land use process, or delays in administrative record preparation, or judicial appeals, or extraordinary appellate writs that may have to be pursued or endured as the scenario unfolds.[12]

Thus, California's newly hatched procedure is the antithesis of a plain, speedy and adequate constitutional remedy. It creates a procedural minefield through which a citizen bold enough to demand vindication of his or her constitutional rights must slog. Such obstacle-course jurisprudence would not be tolerated with respect to any other right secured by the Bill of Rights. Neither should it be tolerated here.

3. The Economic Condition Of Public Entities Does Not Justify Denial Of Constitutional Rights

The California Supreme Court attempted to justify its holding on the ground of "disparity in resources between the federal government and local governmental entities." App. A19; 8 Cal. 4th at 18. The court wrote:

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[12] The case at bar is paradigmatic. Petitioner started his effort to develop this land in 1978, but the final subdivision map was not approved until 1988 — and that only after a litigational detour to the state court of appeal concerning environmental regulations. *Stevens v. City of Glendale*, 125 Cal. App. 3d 986 (1981).

> The likelihood that the impact of a federal regulatory statute may effect a taking of property of such value as to threaten the federal treasury with insolvency is remote. Congress has determined that providing a damage remedy for those cases in which a taking occurs will not cause undue hardship.[13] Few local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property. App. A19-20; 8 Cal. 4th at 18-19.

But this argument proves too much. If the harm so inflicted is economically burdensome to cities, it is *a fortiori* devastating to the individual victims, thus invoking this court's teaching that in fairness and justice, this is precisely the situation in which a citizen should not have to bear alone the public burdens that rightly belong to the public that benefits from the individual's misfortune. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

More importantly, the financial condition of a municipality has no relevance to its duty to obey the Constitution. *Watson v. Memphis*, 373 U.S. 526, 537 (1963) ("It

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13 With respect, that statement is incorrect. Congress has done no such thing, nor could it. The substantive right to just compensation is established by the Fifth Amendment, and the pertinent congressional involvement (i.e., The Tucker Act, 28 U.S.C. §1491) only establishes jurisdiction to hear constitutional claims against the federal government in the U.S. Court of Federal Claims, and waives the defense of sovereign immunity. *See United States v. Testan*, 424 U.S. 392, 398 (1976); *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them"). The Constitution is the "supreme law of the land" (U.S. Const. art. 6, cl. 2) every bit as much in Appalachia as it is in Beverly Hills — or indeed, in Glendale.[14]

In the end, the Opinion's risk-to-the-fisc apprehension evidences a desire to protect regulators against themselves. But if they cannot, or will not, regulate within constitutional boundaries, the answer is to enforce the Constitution, not grant them judicial indulgences when they overreach. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651-56 (1980) where this Court admonished that the prospect of liability for unconstitutional acts that inflict harm on individual citizens, provides a wholesome disincentive to unlawful municipal conduct. As Justice Brennan observed in *San Diego Gas & Electric*, "[i]f a policeman must know the Constitution, then why not a planner?" 450 U.S. at 661 n.26. Why not indeed.

The constitutional focus should be not on protecting inept planners or over-aggressive ideologues wielding regulatory powers from the predictable consequences of their own willful excesses, but on providing incentives to fair choices as to the appropriate allocation of local resources. Justice Holmes' caution in *Pennsylvania Coal Co. v. Mahon*, 260 U.S 393, 416 (1922), that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the

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[14] There is not a scintilla of evidence here, nor even a suggestion, that Glendale — an affluent suburban city — would have any undue problems meeting its constitutional obligation under the Just Compensation Clause.

constitutional way of paying for the change" is as timely today as when it was written. Obedience to the explicit command of the constitution represents a far worthier "policy judgment" than the municipal miscreants' desire to evade the obvious consequences of their wrongdoing.[15]

As Justice Brennan emphasized:

> [T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches. *San Diego Gas & Electric*, 450 U.S. at 661.

4. To Reach Its Conclusion, The California Supreme Court Had To Indulge In Revisionist Revamping Of Both Its Own And This Court's Earlier History

One of the most remarkable aspects of the Opinion is, with respect, its astonishing attempt to deconstruct history. See, *e.g.*, App. A35-36; 8 Cal. 4th at 29, where the Court below expresses its displeasure at Petitioner's statement that in *First English*, 482 U.S. 304, this Court

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[15] The Opinion ignores the economic reality that in takings cases the payment of just compensation is not a net loss to the municipality because as a *quid pro quo* for such payment the government acquires an interest in land at its judicially established fair market value, which (save for transactional costs) leaves its balance sheet unchanged. In other words, avoidance of the just compensation mandate results not only in constitutionally proscribed harm to the victim, but also confers unjust enrichment on the taker.

"overruled" the *Agins I* decision, insofar as the latter held that damages were not a proper remedy in a regulatory inverse condemnation action (quotation marks in the original). But *First English* did exactly that when it expressly admonished that "the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." *Id.* at 311.

Yet, the Opinion states that "[n]othing in *Agins* precluded an action challenging application of the Glendale ordinance to plaintiff's property, or seeking damages in an inverse condemnation action if the ordinance was found to be invalid absent compensation and the city nonetheless denies plaintiff the right to develop the ridge line property." App. A36; 8 Cal. 4th at 29. This reconstruction of recent history may come as a surprise to this Court, which summarized *Agins I* in its subsequent review of that decision thusly:

> The State Supreme Court first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. (Citation) *The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment.*" *Agins II*, 447 U.S. at 258-59 (emphasis added); also see *Id.* at 263 ("State Supreme Court determined that the appellants could not recover damages for inverse

> condemnation even if the zoning ordinances constituted a taking").

And again, in *San Diego Gas & Electric Co*, this Court said:

> "The California Court in *Agins* held that an owner who is deprived of substantially all beneficial use of his land by a zoning regulation is not entitled to an award of damages in an inverse condemnation proceeding. Rather, his *exclusive* remedy is invalidation of the regulation in an action for mandamus or declaratory relief." 450 U.S. at 628 (emphasis added).

The California Supreme Court itself has previously made clear that *Agins I* precluded regulatory inverse condemnation actions. *See, e.g., Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal. 3d 862, 867 n.4 (1985), where the court stated: "The instant case does not involve allegations of unreasonable zoning or regulatory permit activity — the remedy for which, *of course*, is not an inverse condemnation suit for damages, but declaratory relief or mandamus." (Emphasis added.)[16] In short, until this Court spoke in

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[16] California courts of appeal have consistently interpreted *Agins I* as putting an end to regulatory inverse condemnation actions in California. Without an effort on the part of Petitioner to list all such cases *see, e.g., Guinnane v. San Francisco*, 197 Cal. App. 3d 862, 866 (1987), *cert. denied*, 488 U.S. 823 (1988); *Walter H. Leimert Co. v. California Coastal Comm'n*, 149 Cal. App. 3d 222, 234 (1983). To petitioner's knowledge there is no reported California case prior to this one that interpreted *Agins I* as preserving the inverse condemnation remedy in regulatory taking cases under any circumstances. On the contrary, in the only two reported post-*Agins I* cases where trial courts awarded damages, the judgments were

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1987, there was no way that an action for regulatory inverse condemnation could be pursued in California courts, and surely it would have been an irrational endeavor here for petitioner to sue at any time to "invalidate" the plainly valid Ordinance.[17]

5. California's Draconian And Idiosyncratic Land Use Regulation Law Needs To Be Returned To The American Constitutional Mainstream By This Court

Legal scholars — even those favoring strict government land-use controls — have looked in awe at California's consistent disregard of landowners' constitutional rights. Professor Dennis J. Coyle, in preparing his recent book, *Property Rights and the Constitution*, State University of New York (1993), asked eight leading

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reversed on the authority of *Agins I. Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, (1982), *appeal dismissed*, 464 U.S. 805 (1983); *Briggs v. State*, 98 Cal. App. 3d 190, 202-03 (1979), *cert. denied*, 447 U.S. 917 (1980).

[17] As for the California Supreme Court's equally ahistorical statement of state law that damages might have been sought by a writ of mandate, the *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508 (1975), *cert. denied*, 425 U.S. 904 (1978), case notwithstanding (App. A13; 8 Cal. 4th at 14), *HFH* itself (15 Cal. 3d at 518) emphatically states in italicized type: "*Plaintiffs may not seek damages in their pending mandate action*," and it is difficult to see how Petitioner could be required to read *HFH* before the instant opinion came down, as espousing a rule contrary to what it plainly said. In fact, to Petitioner's knowledge, no California case has ever awarded damages for confiscatory land-use regulations in a writ of mandate proceeding.

scholars (identified at p. 277 n.23) to identify the states most protective and least protective of Fifth Amendment rights of property owners. "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts." *Id.* at 11. In a lengthy chapter entitled "California: Where Deference Reigns Supreme," Professor Coyle sums up California courts' message to regulators as "Do what you want." *Id.* at 156.

The late Richard Babcock, dean of the nation's land use bar, and his colleague Charles Siemon — both widely known for their forceful philosophic sympathy to land regulators — wrote extensively on California's unique way with the law. From their *The Zoning Game Revisited*, Lincoln Institute of Land Policy (1985):

> [A]nyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practice. The Fourteenth Amendment appears to be nonexistent. *Id.* at 251.
>
> In California, the courts have elevated governmental arrogance to a fine art. *Id.* at 253.[18]

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[18] These writers have much good company. Representative of books and articles making the same point, from recognized leading scholars from all points of the political spectrum, are Berger, *supra*, p. 9 n.5, at 1140; Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6 (July 1985) (see particularly pp. 6-7); Kudo, Nukolii: *Private Rights and Public Interest*, 16 Urban Lawyer 279 (1974); Hagman, *Exactions, User Fees and Assessments: What Are the Limits?*, Zoning & Planning Handbook 45 (1983) (see particu-

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Though this Court has reminded California twice in the last decade that it was not adhering to constitutional guidelines (*see First English* and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 839 (1987)), unfortunately, California needs to be reminded again that its idiosyncratic jurisprudence is at variance with the Constitution.

C. The Case At Bar Also Presents The Potential For Resolution Of A Troublesome Constitutional Issue Of Partial Inverse Takings That Has Caused Enormous Confusion, Divided Lower Courts, And Inspired This Court To Brand An Earlier Ruling As "Extreme" And "Unsupportable"

Because the court below did not reach the substantive issue of whether a regulation that takes less than 100% of the aggrieved owner's property is compensable, though it was fully briefed below,[19] Petitioner is unable to tender it as a Question Presented. [20] However, based

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(fn. continued)
larly pp. 73-74); Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 Urban Lawyer 724 (1981) (see particularly p. 724 n.6)); and Williams, *American Planning Law* (1974) (see particularly §603 pp. 115-16).

[19] The City argued below that a regulatory taking must be of the full 100% of what the aggrieved owner had, to qualify as compensable, and that a regulatory taking of 120 acres comprising 40% of Petitioner's holding was not actionable.

[20] Petitioner does not wish to run afoul of the rule of *Irvine v. California*, 347 U.S. 128, 129 (1954), by enlarging his arguments beyond the issues formally presented, but he also notes *Capital*

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on the briefing below, Petitioner anticipates that Respondent will raise it in opposition to the Petition.

The genesis of this issue is a dictum in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978), that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments." But as construed by some courts, this statement created rulings contrary to settled takings jurisprudence.[21]

This troublesome issue was recently noted but not resolved by this Court in *Lucas*, where this Court aptly characterized as "extreme" and "unsupportable" the New York Court of Appeal's interpretation of this standard in *Penn Central* itself (120 L. Ed. 2d at 813-14 n.7). Unfortunately, *Penn Central*'s affirmance, though on other grounds, has spawned much confusion on this point. This issue is important, of widespread impact, and the subject of frequent fierce disagreement among lower state and federal courts.

Accordingly, the Court itself may wish to consider it.

(fn. continued)
Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697-98 (1984), holding that the Court itself may address on the merits important issues that, though briefed and argued below, were not expressly addressed in the lower court's opinion.

[21] *See, e.g., United States v. Grizzard*, 219 U.S. 180 (1911) (partial inverse takings require payment of compensation for the land taken, plus severance damages to the remaining land, the same as in an eminent domain action); *United States v. Causby*, 328 U.S. 256, 262 (1946) (the fact that partial taking does not completely destroy enjoyment and use of the land in question is not decisive). In fact, much of this Court's inverse condemnation law arises from partial takings.

CONCLUSION

In an evident effort to frustrate this Court's plain holding in *Agins II*, that California may not interdict the constitutionally mandated "just compensation" remedy for regulatory takings, the court below has structured a remedial regime that — in violation of the procedural strictures of *First English*, *Williamson County* and *Lucas* — does just that. It is an act of attempted nullification not seen in constitutional jurisprudence since *Cooper v. Aaron*, 358 U.S. 1 (1958) and it warrants a similar response from this Court (see, *id.* at 19).

The constitutional framers rightly believed that state courts cannot be trusted with enforcement of federal rights that might impinge on local predilections. *E.g.*, James Madison, 1 Ann. Cong. 813, quoted in *Greenwood v. Peacock*, 374 U.S. 808, 836 (1966). The case at bench is the proverbial "Exhibit A" for such concerns. In Justice Kennedy's apt words in *Lucas*, if the Takings Clause is to be effective, "its enforcement must not be frustrated by a shifting background of state law." 120 L. Ed. 2d at 824. Or, as summed up by Justice Holmes, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

There is no respectable reason — logical, ethical or pragmatic — why the already over-complex procedural regime of regulatory takings remedies should be permitted to proliferate even further to thwart important constitutionally protected property rights. As this Court recently observed in *Dolan v. City of Tigard*, those rights are a part of the Bill of Rights and not some sort of constitutional "poor relation." 512 U.S. __, 129 L. Ed. 2d 304, 321 (1994).

The redundant "procedure" contrived below denies due process as well as just compensation. Its avowed rationale has "no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them." *Shapiro v. Thompson*, 394 U.S. at 631. It is an invitation to endless Dickensian litigation that mocks the Constitution and frustrates this Court's repeated efforts to establish a fair procedural and remedial framework within which to balance the community's reasonable regulatory power, against individual constitutional rights. In California, that balance is once again badly askew against the Constitution. And other states, motivated by the perceived concerns that resulted in *Hensler*, may follow suit.

Petitioner prays that the writ issue.

DATED: December 21, 1994.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
JUL 25 1994
Robert Wandruff Clerk

R. R. HENSLER,
Plaintiff and Appellant,
v.
CITY OF GLENDALE,
Defendant and Respondent.

S032210
Ct. App. 052246
Super. Ct. No. NCC41335

The parties in this case ask the court to determine the statute of limitations applicable to a complaint in inverse condemnation which alleges a taking of real property resulting from the adoption, or application to the plaintiff's property, of an ordinance enacted pursuant to the Subdivision Map Act. (Gov. Code, § 66410 et seq.) We conclude that an action in inverse condemnation, whether or not joined with an action in administrative mandamus (Code Civ. Proc., § 1094.5) challenging the ordinance or its application to the plaintiff's property, is governed by Government Code section 66499.37 (hereafter section 66499.37)[1] unless it alleges the

[1] Section 66499.37: "Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal (continued)

existence of a final judgment establishing that there has been a compensable taking of the plaintiff's land.

The legislative intent is clear. Section 66499.37 was enacted to ensure that *any* challenge to local legislative or administrative acts or decisions taken pursuant to ordinances enacted under the authority of the Subdivision Map Act will be brought promptly. A complaint in inverse condemnation, even one which does not expressly attack the validity of the ordinance or its application, and seeks only compensation for an alleged taking, must be deemed a challenge to the local action. This follows because the constitutional validity of the governmental action if uncompensated must be determined in the course of ruling on the claim that compensation is owed. Moreover, the validity of the action must be determined to afford the local entity the opportunity to rescind its action rather than pay compensation for a taking. A landowner may not, by seeking only compensation, force a governmental agency to condemn the property.

Therefore, unless the complaint alleges that the existence of a taking has already been judicially established, the complaint necessarily states a cause of action which requires judicial review of a decision of the local

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board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings."

legislative body concerning a subdivision or of the reasonableness, legality, or validity of any condition attached to a permit decision within the meaning of section 66499.37. An action which requires that review is governed by section 66499.37 regardless of the plaintiff's characterization of the cause of action.

Having reached that conclusion we shall affirm the judgment of the Court of Appeal.

I

EVENTS AND PROCEEDINGS BELOW

The complaint alleges that plaintiff purchased a 300-acre tract of land zoned for single family residential use in 1978. In 1981, defendant City of Glendale (Glendale) adopted an ordinance which prohibited construction on major ridge lines within the city.[2] The

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[2] It is undisputed that the ordinance was enacted pursuant to the authority granted by the Subdivision Map Act. Defendant has requested that this court take judicial notice both of this ordinance, No. 4533, and a predecessor ordinance enacted in 1971 which it amended, No. 3993. We grant that request and defendant's request that the court take judicial notice of certain other documents which defendant believes are relevant to the legislative history of section 66499.37 and subject to judicial notice under Evidence Code section 452. To the extent that the request seeks judicial notice of letters to the Governor from individual legislators and private persons reflecting their understanding of the purpose and effect of legislation creating special statutes of limitation for challenges to subdivision and zoning related decisions, the request is denied. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157, fn. 6.)

Section 28-2.1 of ordinance No. 4533 provided in pertinent part:

> "a. Intent and purpose. The city is experiencing unprecedented hillside subdivision development which without proper planning may destroy major ridge lines which are an exhaustible and precious scenic resource of

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ordinance was enacted pursuant to authority granted by the Subdivision Map Act. Plaintiff was advised by city representatives that development would not be permitted on ridge lines on his property. A plan for the construction of 588 residential units on the property was approved on April 1, 1986, but that approval rejected all proposed use and any encroachment within, on, or over the major ridge lines within the tract. Claiming that the ordinance on which this action was based precluded development of 40 percent of the tract, plaintiff initiated this action in inverse condemnation in September 1989. Glendale demurred, asserting the 90-day limitations period of section 66499.37. It also argued that plaintiff's failure to challenge the conditions placed on development of his land barred the inverse condemnation action. The trial court sustained the demurrer and entered judgment dismissing the action. Plaintiff appealed.[3]

(fn. continued)

> the city and its citizens; it is necessary that subdivision developers include with their tentative tract maps, plans for the preservation of major ridge lines.
>
> "b. Submission of plans. The tentative tract map and plans for any subdivision development which touches, crosses, includes or effects major ridge lines shall include plans for the complete preservation of such major ridge line areas in their natural state.
>
> "c. Major ridge lines defined. . . . No engineered slopes, housing construction, streets, utilities, or other man-made features shall be permitted within identified major ridge line areas."

[3] Defendant asserts that plaintiff sold the property that is the subject of this action in 1986, long before he filed this action; complains that he failed to exhaust available administrative remedies and was permitted dense cluster development on the property; and argues that plaintiff should not be permitted to take advantage of the permit and subsequently challenge its conditions. While some or all of these claims might have been asserted in a demurrer or in defense of the

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The Court of Appeal affirmed the judgment of dismissal. The court held that the longer limitations period of Code of Civil Procedure section 338, subdivision (j), and Code of Civil Procedure sections 318 and 319, which govern actions for damage to and taking of property, were not applicable to actions based on a decision made pursuant to an ordinance enacted under the authority of the Subdivision Map Act.

II

THE NATURE OF PLAINTIFF'S ACTION

Plaintiff argues that his action is one for a taking of his property, not a challenge to the city ordinance or to the actions taken on his application for a development permit. His position is, simply stated: The ridge line acreage on which development is not permitted was taken by virtue of the enactment and/or application of the Glendale ordinance which forbids development on the land. Therefore, he is entitled to bring an action in inverse condemnation based on his inability to develop that portion of the property notwithstanding his failure to initiate a timely challenge to the permit condition or application of the ordinance to his property through a proceeding in mandamus.

(fn. continued)
action, we need not address them here since the sole ground for the demurrer was the applicability of section 66499.37.

For purposes of review of an order sustaining a demurrer to a complaint, we accept as true all material allegations of the complaint (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 7) and do not go beyond the face of the complaint and matters of which the trial court took judicial notice. (Evid. Code, § 459.) Defendant does not assert that the trial court was requested to and did take judicial notice of the events to which it alludes that are not alleged in the complaint.

The question is not answered that easily, however. Before considering which limitations period applies to this action, it is necessary to address plaintiff's argument that, as a matter of federal constitutional right, an action in inverse condemnation seeking damages for a permanent taking may be initiated in the first instance without a challenge to the application of the ordinance to the affected property.

A. Fifth Amendment "Taking" Clause.[4]

Because plaintiff relies in part on authority applicable to a taking of property which occurs when a public agency causes a physical invasion of private property, it is important to note that a "regulatory" taking differs. "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. [Citation.] But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee v. City of Escondido* (1992)

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[4] Plaintiff relies on both article I, section 19 of the California Constitution and the takings clause of the Fourteenth Amendment to the United States Constitution. He relies primarily on federal authority, however. While article I, section 19, protects a somewhat broader range of property values than does the Fourteenth Amendment takings clause (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 298), that distinction is irrelevant to the issues in this case. Our conclusion that the prerequisites to an inverse condemnation action arising out of a regulatory taking do not deny landowners any rights guaranteed by the Fourteenth Amendment applies equally to rights claimed under article I, section 19.

503 U.S. __ [118 L.Ed. 153, 162] 112 S.Ct. 1522, 1526.) An individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking. (See, e.g., *Dolan v. Tigard, Ore.* (1994) __ U.S. __ [62 U.S.L.Week 4576].)

Ignoring the distinction between regulatory taking and takings by action which affects title or involve physical invasion, plaintiff contends that a landowner may not be required to exhaust state administrative and judicial remedies, and may sue directly on a constitutional just compensation cause of action. He relies for that assertion on both *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, and *First Lutheran Church v. Los Angeles* (1987) 482 U.S. 304. Neither case supports such a broad proposition. Rather than supporting plaintiff's claim that a taking occurs at the time an ordinance which restricts development is enacted, *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. 172, held that the landowner's claim was not ripe for adjudication. The court held, as it had done in earlier cases, that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Id.*, at p. 186.) In that case the court noted that no variance had been sought from either the planning commission or the administrative appellate body, the board of zoning appeals. The court emphasized that until there has been a "final, definitive position regarding" how the regulations will be applied to the land, a court cannot determine whether a compensable taking has occurred. (*Id.*, at p. 191.) As an alternative ground

for concluding that the claim was not ripe, the court noted that the landowner had not utilized state procedures for seeking compensation. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." (*Id.*, at p. 195.)

Far from supporting plaintiff's position therefore, the *Williamson* decision holds: (1) until a final administrative decision has been made, one which affords the administrative agency and any reviewing body having similar authority the opportunity to amend the agency decision and/or grant a variance, whether a taking has occurred through application of a land use regulation to specific property cannot be determined; and (2) a state may establish reasonable procedures by which taking claims are to be brought. Moreover, the responsible governmental entity has the option of exempting the property from the ordinance or regulation, or even repealing the ordinance as an alternative to paying compensation for a permanent taking if it is judicially determined, after administrative remedies have been exhausted, that application of the restrictions to the property will constitute a compensable taking.

First Lutheran Church v. Los Angeles, supra, 482 U.S. 304, offers no additional support for plaintiff's position. The question presented in that case was whether compensation must be paid for deprivation of use of property caused by an ordinance that is ultimately invalidated by the court. The Supreme Court held that temporary taking must be compensated. In so doing, however, it cast no doubt on the right of a state to require that a landowner seeking compensation for permanent deprivation first seek a variance or invalidation of the ordinance or regulation as applied to the owner's property. The court held only that invalidation

of an overly restrictive zoning ordinance is not a "sufficient remedy" (482 U.S. at p. 319) because it does not provide compensation for the temporary taking prior to invalidation.[5] It did not question invalidation as an adequate alternative to forcing the state to pay compensation for a permanent taking, however. Instead the court reaffirmed: "Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function . . . . *Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.*" (*Ibid.*, italics added.)

The high court recently reaffirmed the continued availability of these options in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. __ [120 L.Ed.2d 798].) There the court held that a regulation which denied a coastal owner the right to any construction on or other beneficial use of his property would constitute a compensable taking if, under state law, a right to develop the land existed prior to enactment of the challenged regulation. Although the court remanded the matter to the state court to determine what rights had existed, the court also admonished: "*Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation.*" (*Id.*, at p. __, fn. 17 [120 L.Ed.2d at p. 822, fn. 17], italics added.)

Plaintiff seeks to deny the city these options. He claims that he need not seek a variance, exhaust administrative remedies, or give the city the opportunity to

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[5] In holding that compensation must be paid for a temporary taking prior to the invalidation of the ordinance, the court was careful to point out that its holding did not address the problem of normal delays in the permit process. (*Id.*, at p. 321.)

rescind the ordinance or exempt his property after obtaining a judicial determination that application of the ordinance to the property does effect a compensable taking. The authorities on which plaintiff relies do not support his thesis that the only precondition to a suit for compensation is administrative application of the ordinance restricting development of his property. He seeks to do what the high court says a landowner has no right to do — to force the city to exercise the power of eminent domain.

Moreover, not every land use restriction which designates areas on which no development is permitted results in a compensable taking. The governing constitutional authority recognizes that the impact of a law or regulation as applied to a specific piece of property determines whether there has been a compensable taking. Compensation need not be paid unless the ordinance or regulation fails to serve an important governmental purpose or "goes too far" as applied to the specific property that is the object of the litigation. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) The impact of a law or regulation on the owner's right to use or develop the property cannot be assessed until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction. A final administrative decision includes exhaustion of any available review mechanism. Utilization of available avenues of administrative relief is necessary because the court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348, see also *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 297; *Long Beach Equities, Inc. v. County*

of Ventura (1991) 231 Cal.App.3d 1016, 1032; *California Coastal Com. v. Superior Court (Ham)* (1989) 210 Cal.App.3d 1488, 1500.)

Plaintiff's complaint acknowledges that development has been permitted on part of his property, and thus concedes that the Glendale ordinance did not deny him all economically feasible use of the property. We therefore reject both plaintiff's claim that a compensable taking of his property necessarily occurred when the Glendale ridge line ordinance was enacted because development was limited to less than all of the property and his argument that he need not pursue administrative and judicial remedies as a prerequisite to a suit in inverse condemnation. He may not avoid these steps and compel the defendant to purchase the undeveloped portion of his property by electing to seek only compensation in an inverse condemnation action.

B. California Administrative and Judicial Remedies.

The Fifth Amendment to the United States Constitution conditions the state's right to take private property for public use on the payment of "just compensation." It leaves to the state, however, the procedures by which compensation may be sought. "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." (*Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. 172, 194-195; see also *Preseault v. ICC* (1990) 494 U.S. 1, 11.)

California provides such a process by making available an action for inverse condemnation if, after exhausting administrative remedies to free the property from the

limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted. In that action the court determines whether the restriction on development "goes too far" and will be constitutionally impermissible unless just compensation is paid for the taking brought about by the restriction.

When property is damaged, or a physical invasion has taken place, an inverse condemnation action may be brought immediately because an irrevocable taking has already occurred. If the alleged taking is a "regulatory taking," i.e., one that results from the application of zoning laws or regulations which limit development of real property, however, the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking. The owner may do so, where appropriate, by a facial challenge to the ordinance, but in most cases must seek a variance if that relief is available and then exhaust other administrative and judicial remedies. The facial challenge may be through an action for declaratory relief (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273). The latter, an "as applied" challenge to the development restrictions imposed by the administrative agency, may be properly made in a petition for writ of "administrative" mandamus to review the final administrative decision (Code Civ. Proc., § 1094.5) and that action may be joined with one for inverse condemnation. A declaratory relief action also may be joined with an action in inverse condemnation. (*State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 251.) Damages for the "taking" may be sought in an administrative mandamus action (Code Civ. Proc., § 1095), or, if the

plaintiff seeks a jury trial, in the joined inverse condemnation action. (*Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 614; *Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 642, 660; *California Coastal Commission v. Superior Court (Ham), supra*, 210 Cal.App.3d 1488, 1494.)[6] The owner "may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." (*Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 273.) Compensation must be paid for a permanent taking only if there has been a final judicial determination that application of the ordinance or regulation to the property is statutorily permissible and constitutes a compensable taking. Even then the state or local entity has the option of rescinding its action in order to avoid paying compensation for a permanent taking.

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[6] Plaintiff's belief to the contrary notwithstanding, this court did not hold in *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, that damages for a taking of property could not be sought in a mandamus action. We held that the plaintiff could not add a tort claim for damage predicated on acts for which the Government Code provides immunity, as for injury caused by adopting or failing to adopt an enactment. (See Gov. Code, § 818.2.) In that case we had explained that the plaintiff, who alleged that the value of his property had decreased as a result of the adoption of a zoning ordinance, had not stated a taking claim. (15 Cal.3d at p. 518.) We did not hold, nor could we, consistent with the takings clause of the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution, that the Legislature may immunize the state or a local agency from liability for a taking.

Plaintiff argues that it is unreasonable and constitutionally impermissible to require a landowner to pursue these remedies. He argues that it is unreasonable because the owner must bear the expense of and suffer the delays attendant on an administrative proceeding, judicial review in a mandamus proceeding, and an inverse condemnation proceeding. He argues it is constitutionally impermissible because the owner may not exercise the right to jury trial in a mandate proceeding.

We are not persuaded. As noted above, the inverse condemnation proceeding may be joined with the petition for writ of mandate. Thus, there is no extended delay, and, as the court held in *First Lutheran Church v. Los Angeles, supra*, 482 U.S. 304, the landowner is entitled to damages for any loss of use of the property beyond that to be expected as part of the normal permit process. Moreover, the expense of a meritorious taking claim will not be borne by the owner. Not only are damages for a temporary taking available, but the owner's reasonable costs and attorney fees must be reimbursed by the local entity if the owner establishes that the restriction on land use is a compensable taking. (Code Civ. Proc., § 1036; *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 375-377; *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 104; *In re Development Plan for Bunker Hill* (1964) 61 Cal.2d 21, 71.)

In some cases, all of the evidence necessary to establish a taking claim may have been presented in the administrative proceeding. If it was not possible for the landowner to present that evidence, it may be introduced in the mandate proceeding. Subdivision (e) of Code of Civil Procedure section 1094.5 permits the introduction of additional evidence that is relevant to a challenge to the administrative action if the evidence "could not have been produced or . . . was improperly excluded at the

hearing before" the administrative agency. Thus, the trial court is able to resolve the taking claim in the mandate proceeding.

A landowner is, as plaintiff argues, entitled to a jury trial in an inverse condemnation action. Article 1, section 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." Therefore, the right to jury trial applies in inverse condemnation actions, but that right is limited to the question of damages. (*Highland Realty Co. v. City of San Rafael* (1956) 46 Cal.2d 669, 683; *People v. Ricciardi* (1943) 23 Cal.2d 390, 402; *Contra Costa County Flood Control etc. Dist. v. Lone Tree Investments* (1992) 7 Cal.App.4th 930, 936.)

A property owner is, of course, entitled to a judicial determination of whether the agency action constitutes a taking. (*Healing v. California Coastal Commission* (1994) 22 Cal.App.4th 1158, 1174.) Administrative adjudication in the course of exercising an administrative agency's regulatory power, if subject to judicial review, does not deny participants their right to judicial determination of their rights. (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 374-375.) We agree with the *Healing* court, however, that an administrative agency is not competent to decide whether its own action constitutes a taking and, in many cases, administrative mandate proceedings are not an adequate forum in which to try a takings claim.

If the administrative hearing is not one in which the landowner has a full and fair opportunity to present evidence relevant to the taking issue, one in which witnesses may be sworn, and testimony presented by means of direct and cross-examination, the administrative record is not an adequate basis on which to

determine if the challenged action constitutes a taking. (*Healing v. California Coastal Com., supra,* 22 Cal.App.4th 1158, 1170.) A judicial determination is available in the mandate proceeding, however, if the administrative action is challenged on the basis that it is a compensable taking, the hearing did permit full litigation of the facts relevant to the takings issue, and any additional issues are litigated before the court. Because a taking of property is alleged, the court must accord the owner de novo review of the evidence before the agency in ruling on the taking claim (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-44; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 140) and consider any additional evidence admitted at the hearing on the petition for writ of mandate.

If the owner believes the hearing before the administrative agency was not adequate, the owner is assured a full and fair hearing by exercising his right to join an inverse condemnation action with the mandate proceeding. In the inverse condemnation proceeding the owner may both litigate the taking claim, and if successful, assert the right to jury trial guaranteed by article I, section 19 of the California Constitution. The availability of these procedures satisfies the requirement that a state provide an adequate process for obtaining compensation when property is taken for public use.

Nor does the imposition on the property owner of the requirement that administrative remedies be exhausted as a prerequisite to an inverse condemnation action impermissibly deny the owner the right to compensation as a "preferred remedy."[7] The "preferred remedy" to which

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[7] Plaintiff's suggestion that *Preseault v. ICC, supra,* 494 U.S. 1, 12, makes a suit in inverse condemnation the remedy of "first instance" lacks merit. *Preseault* dealt with a claim that title to property had been taken pursuant to federal action and construed federal statutory

(continued)

plaintiff claims a right is not one recognized as part of constitutional takings jurisprudence. The decisions in which he finds this preference are simply applications of federal law. They hold that in situations in which Congress has not withdrawn from the Court of Claims the jurisdiction conferred by the Tucker Act (28 U.S.C. § 1491(a)(1)) over claims for damages founded on, inter alia, the United States Constitution, it is improper to enjoin operation or enforcement of a federal statute on the ground that such enforcement might bring about a compensable taking. Those decisions say nothing about the power of a state to reserve the right to rescind a statute or ordinance, or to exempt property from its

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(fn. continued)
law which created a claims procedure which, the court held, had to be followed before an attack on the regulation which resulted in the alleged taking could be pursued. *Hurley v. Kincaid* (1932) 285 U.S. 95, also involved only federal law. The court held there that the plaintiff could not sue to enjoin operation of a federal flood control project which caused occasional flooding of plaintiff's land as Congress had provided a remedy by which compensation would be paid for such damage. *Ruckelshaus v. Monsanto Co.* (1983) 463 U.S. 1315, is not an opinion of the court. It is an in-chambers opinion of Justice Blackmun denying a stay pending appeal from an injunction against enforcement of provisions of a federal pesticide regulation statute under which trade secrets might be disclosed. Not only is there no "holding" to the effect that inverse condemnation rather than specific relief is the proper remedy, there is no discussion of that topic. The court's actual holding in *Ruckleshaus v. Monsanto Co.* (1984) 467 U.S. 986, offers no support for plaintiff's position. Again the court applied federal law, holding that because a federal claims procedure was available to provide just compensation if trade secrets had been disclosed, it was improper to enjoin actions the administrative agency took under the pesticide law. The case had nothing to do with regulatory taking of real property or state procedural prerequisites to inverse condemnation actions, and did not create a federal, constitutionally mandated, right to seek monetary compensation in lieu of other remedies.

scope, if it is determined that enforcement of the statute will result in a compensable taking.

In *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, for instance, the court held that it was improper to enjoin enforcement of a federal statute which required a permit for discharging fill into protected wetlands. The court reiterated the well-established proposition that if compensation is available when property is in fact taken, the governmental action is not unconstitutional. (474 U.S. at p. 128.) However, the court pointed out, the permit requirement itself did not take any land, and if a permit were to be denied with the result that no economically feasible use could be made of the property, federal law provided a means of obtaining compensation for any taking that might occur. For that reason it was premature to seek an injunction.

Far from supporting plaintiff, this case confirms that when restrictions on use of real property are the basis for a taking claim, the owner must pursue any available administrative permit process before seeking compensation or challenging the statute or regulation. The California permit process includes both administrative and judicial review of any conditions to which the landowner objects. Only when the review process has been completed is it possible to determine whether a taking has occurred. Nothing in the high court's holding that an injunction against enforcement of the law or regulation which requires a permit is premature suggests that compensation must be paid immediately upon either enactment of the statute or issuance of a permit with restrictions on development.

The other cases on which plaintiff relies also involve attempts to enjoin enforcement of a federal statute and are no more supportive. *Dames & Moore v. Regan* (1981) 453 U.S. 654, held only that if a presidential order suspending claims against Iran were to effect a

taking of the plaintiff's property, the "treaty exception" to the jurisdiction of the United States Court of Claims would not bar a claim for compensation. *Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102, held that because the Regional Rail Reorganization Act of 1973 (45 U.S.C. § 701 et seq.) had not withdrawn jurisdiction from the United States Court of Claims, an adequate remedy existed for any taking that might result. The district court erred therefore in declaring the act unconstitutional and enjoining its enforcement. In *Dugan v. Rank* (1963) 372 U.S. 609, claimants to water rights attempted to enjoin storing and diversion of water as part of a federal Bureau of Reclamation project. The court held that their remedy, if valid rights were interfered with or partially taken, was a suit for damages. Finally, *U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, affirmed a United States Court of Claims judgment awarding compensation for a taking of riparian rights, noting that the absence of equitable remedies did not mean that no right was available. The rule on which plaintiff would rely, that the adequacy of a damage remedy is usually grounds for denying equitable remedies, was invoked by the court. It did so, however, with respect to the alternatives of specific performance, mandatory order, and injunctions. (*Id.*, at p. 752.) The court did not address the right of a state to enforce procedures by which the state or local governmental entity may determine whether its actions will effect a taking, and, if so, to opt to withdraw the objectionable restrictions on development.

The disparity in resources between the federal government and local governmental entities both explains and justifies the state procedure. The likelihood that the impact of a federal regulatory statute may effect a taking of property of such value as to threaten the federal treasury with insolvency is remote. Congress has

determined that providing a damage remedy for those cases in which a taking occurs will not cause undue hardship. Few local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property.[8]

The California procedural requirements to which plaintiff objects do no more than ensure to the state its right to a prepayment judicial determination that the ordinance or regulation is excessive and will constitute a taking, thus affording the state the option of abandoning the ordinance, regulation, or challenged action, or exempting parcels from its scope if the regulation on use is excessive. As we noted above, the United States Supreme Court has recognized repeatedly the right of the state to reserve the option of rescinding a statute that imposes excessive regulation, and has reaffirmed the principle that a landowner may not compel the state to initiate an eminent domain action. These requirements extend that principle to the inverse condemnation context.

Plaintiff's action is not a claim against the federal government. It is not governed by the federal authority on which plaintiff relies. A California landowner who believes that application of a state statute or local ordinance limiting development of the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking. If he does so, the state may deem the owner to have waived the "taking" claim. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511; *Rossco Holdings, Inc. v. State of California, supra,* 212 Cal.App.3d 642, 654.)

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[8] The prayer in plaintiff's complaint sought damages of $10 million for the alleged taking of his property alone.

"If the conditions imposed by the city in the[] permit were invalid, Code of Civil Procedure section 1094.5 provided plaintiffs with the right and procedures to eliminate them. *By declining to avail themselves of those procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation.*" (*Pfeiffer v. City of La Mesa*d (1977) 69 Cal.App.3d 74, 78, italics added.)[9] As the *Pfeiffer* court observed, if a landowner could do so, "complete chaos would result in the administration of this important aspect of municipal affairs." (69 Cal.App.3d at p. 78.)

In the face of case law which unanimously and repeatedly has rejected his arguments, plaintiff, and amicus curiae Pacific Legal Foundation, cite only *Golden Cheese Co. v. Voss (1991) 230 Cal.App.3d 727 (Golden*

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[9] Contrary to plaintiff's assertion, *Pfeiffer v. City of LaMesa, supra,* 69 Cal.App.3d 74, was not "nullified," by *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, which cited the case with approval, but distinguished it. The Legislature has now codified the rule that one who accepts the benefits of a permit may not later challenge conditions imposed on or in the permit. Government Code section 66020 creates a limited exception under which a residential housing developer may challenge a permit condition such as that in issue here while proceeding with development. That section, enacted in 1990, permits a protest if the developer provides evidence of arrangements made to ensure performance of the condition if it is upheld. The developer must also serve notice of the protest on the agency and the protest must be filed at the time the condition is approved or within 90 days after it is imposed and initiate a legal action to review or attack the condition within 180 days after the date of imposition.

The Legislature otherwise indicated approval of and codified the *Pfeiffer* rule in subdivision (d) of Government Code section 66020, a provision which denies any further review rights if the procedures outlined in the statute are not followed: "Thereafter, notwithstanding any other law to the contrary, all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the imposition."

Cheese II) as California authority for maintaining an inverse condemnation action without seeking exemption from a restrictive administrative regulation, and, if unsuccessful, seeking a judicial determination that application of the law or regulation will effect a constitutionally impermissible taking if compensation is not paid. The case does not support petitioner. The case did not involve land use regulation and the administrative and judicial remedies which are available to, and must be exhausted by, landowners who claim that such regulation effects a taking.

The court did state in *Golden Cheese II* that the plaintiff in that case could state an inverse condemnation cause of action without challenging the validity of the administrative order in issue there. However, plaintiff overlooks both the context of that statement and the fact that a complaint challenging the validity of the order had been filed with the inverse condemnation complaint.

Golden Cheese II, on which plaintiff relies, followed the decision of the Court of Appeal in *Golden Cheese Co. v. Voss* (1991) 230 Cal.App.3d 547 (*Golden Cheese I*), a companion case in which the trial court had upheld the validity of a milk marketing plan. The Court of Appeal had affirmed the judgment which denied a petition for writ of mandate. The challenged plan fixed the minimum price for milk used for cheese. The court held that the order was a valid exercise of the discretion given to the director by the Milk Stabilization Act (Food & Agr. Code, § 61801 et seq.). The new formula for pricing the milk, which the trial court and the Court of Appeal upheld, included a manufacturing cost allowance. The Director of the Department of Food and Agriculture found that Golden Cheese was one of the three highest cost plants, and was not reasonably efficient. The formula adopted did not accommodate the costs of manufacturing in the Golden Cheese plant and,

as a result, did not permit Golden Cheese to pass on all of the costs of milk. The Court of Appeal nonetheless upheld the formula.

Golden Cheese II was an appeal from a judgment for defendant entered after the trial court sustained without leave to amend a demurrer to an inverse condemnation complaint. In the inverse condemnation action, the company claimed that the price fixing order and a conclusion of the Director of the Department of Food and Agriculture that operation of the Golden Cheese plant was contrary to the economic health of the dairy industry brought about a regulatory taking of its business. Golden Cheese based its taking argument on allegations that the director's actions did not allow it to recover its costs and destroyed any viable economic interest it had in its plant and property. The trial court sustained a demurrer without leave to amend on the ground that the plaintiff did not challenge the validity of the marketing order. The Court of Appeal concluded that this was error because the action challenged the marketing order as applied. Therefore, the court reasoned, Golden Cheese had stated or could state an "as applied" cause of action in inverse condemnation without alleging the invalidity of the director's order.

There is nothing remarkable in that conclusion. An otherwise valid statute or regulation may be invalid as applied to a particular property if compensation is not paid. The Court of Appeal noted that the validity of the order had been challenged in the companion case, and that the action did not involve regulation of real property. Nothing in the opinion suggests that the demurrer to the Golden Cheese complaint asserted a procedural bar to the action based on failure to exhaust available administrative and judicial remedies. And, of course, the case did not involve any issue with respect to a statute of limitations.

Moreover, the actual holding in *Golden Cheese II* was that the holding in *Golden Cheese I* was res judicata on the question of whether the pricing formula was reasonable. Because it was, Golden Cheese had no reasonable investment-backed expectations to any particular milk price level, and there had been no taking of its property. *Golden Cheese II* thus offers no support for plaintiff's argument that he may bypass proper administrative and judicial remedies, and avoid an expressly applicable statute of limitations, when the alleged regulatory taking occurs through application of ordinances adopted pursuant to the Subdivision Map Act.

C. The Applicable Statute of Limitations.

Relying on his theory that an inverse condemnation action may be pursued without seeking administrative relief from the land use regulation which restricts development, followed by judicial review of the final administrative decision, plaintiff argues that the Court of Appeal erred in rejecting his claim that application of the Glendale ordinance to his property was a "continuous wrong" for which a new cause of action arises each day the city fails to compensate him. He contends that this must be the rule or property owners cannot know the point in time at which the taking occurs and the statute of limitations commences running.

The Court of Appeal did not err in this respect. If the challenge is to the facial validity of a land use regulation, the statute of limitations runs from the date the statute becomes effective. Government Code section 65009 establishes a 120-day period of limitation for such

actions.[10] By contrast, if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision.[11] Government Code section 66499.37 establishes a 90-day period of limitation for these actions. Thus, there is no uncertainty regarding the commencement of the period. Whether the complaint is deemed a facial challenge or an as applied challenge, it is untimely.

Stone v. City of Los Angeles (1975) 51 Cal.App.3d 987, on which plaintiff relies for his argument that he has suffered a continuous wrong, does not support that claim. *Stone* was an action for loss of use of property caused by precondemnation delays after the defendant city had announced its intent to condemn the property. The Court of Appeal was not dealing with a taking which, allegedly, was complete at the time the action was filed.

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[10] Government Code section 65009, subdivision (c):

> "Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 120 days after the legislative body's decision:
> ". . . .
> "(2) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance."

[11] When that decision involves approval of a subdivision map, the "final administrative decision" is the final administrative action approving or rejecting the tentative map, an adjudicatory decision, since approval of a final map which substantially complies with the previously approved tentative map is a mandatory ministerial act. (Gov. Code, § 66474.1; *Griffis v. Mono County* (1985) 163 Cal.App.3d 414, 426-427; *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, 506.)

Plaintiff argues alternatively that Code of Civil Procedure sections 318, 319, or 338 apply. They do not. They are applicable only if no "different limitation is prescribed by statute." (Code Civ. Proc., § 312.) Government Code section 66499.37 is a "different limitation" which now governs actions in which such issues are raised.

To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of action. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214; *San Filippo v. Griffiths* (1975) 51 Cal.App.3d 640, 645.) "[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code." (*Maguire v. Hibernia S.& L. Soc.* (1944) 23 Cal.2d 719, 733.)

"The 'patent legislative objective' of [section 66499.37] is to ensure that judicial resolution of Subdivision Map Act disputes occurs 'as expeditiously as is consistent with the requirements of due process of law.' " (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 442.) As the Court of Appeal recognized here and in *Hunt,* section 66499.37 applies by its terms to *any* action involving a controversy over or arising out of the Subdivision Map Act. Therefore, if this is a claim arising out of application of a land use regulation authorized by that act, section 66499.37 applies. Plaintiff seeks to avoid application of section 66499.37 by arguing he does not challenge the validity of the Glendale ordinance. He seeks only compensation for the taking he alleges was effected by the ordinance. He contends on that basis that the statutes of limitation found in the Code of Civil Procedure govern this action. We disagree.

Relying on *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 867, plaintiff asserts that the five-year period of limitation established by Code of Civil Procedure sections 318 and 319 apply to this action.

Baker did not involve a limitation on development, however. There the action was one for an alleged continuing nuisance caused by noise, smoke, and vibration from aircraft taking off and landing at defendants' nearby airport. The court deemed the gravamen of the cause of action to be one for an invasion of the plaintiffs' property, and on that basis concluded that the five-year statute of limitations of Code of Civil Procedure sections 318 and 319 applied.

The court did not hold in *Baker* that all actions styled by the plaintiff as actions for inverse condemnation are subject to the five-year statute of limitations. In ruling that the five-year statute applied to that action it relied on *Frustruck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 374. In *Frustuck*, an inverse condemnation action was based on a physical invasion of the plaintiff's property by defendant city, whose agents enlarged a drainage ditch on the property and created a berm by piling up dirt, debris, rock and other material on the property. In concluding that the five-year statute applied, rather than the three-year statute for trespass, the Court of Appeal reasoned that the area in issue had been taken for public use. Unlike the present action, both *Baker* and *Frustruck* were actions based on physical invasion of the property.

There is no basis for a conclusion that Code of Civil Procedure sections 318, 319, or 338 govern this action, therefore. The complaint does not allege facts to establish that title to the land was affected by enactment of the ordinance or that a physical invasion of the land took place.

Assuming, arguendo, that plaintiff's complaint alleges facts adequate to establish a taking of 40 percent of his property either by virtue of the enactment of the ridge line ordinance or by the restrictions administratively imposed on development under the authority of the ordinance, the complaint is untimely.[12] If this action were deemed a facial challenge to the Glendale ordinance predicated on a theory that the mere enactment of the Glendale ordinance worked a taking of plaintiff's property, it would be untimely even under *Frustruck* as the complaint was filed more than five years after the ordinance was enacted. Moreover, as the State of California points out in its amicus curiae brief, since *Frustruck* was decided the Legislature has adopted not only section 66499.37, but also section 65009, a 120-day statute of limitations specific to challenges to the facial validity of zoning ordinances.[13]

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[12] The State, appearing as amicus curiae, argues that an ordinance or regulation which purports to deny affected property owners any economically feasible use of property without provision for compensation is invalid. The basis for this argument is that article I, section 19 of the California Constitution requires that compensation be paid for any taking. It follows, the State argues, that an owner may not compel the government to compensate the owner for action purportedly taken under an invalid statute. We agree that if an ordinance reflected legislative intent to take property in this manner and did not include a provision for compensation it would be invalid. It is unlikely that an ordinance which merely regulates the use of property would reflect such an intent, however. The State's argument does not acknowledge the possibility that a zoning or land use ordinance or regulation which makes no provision for payment of compensation may be invalid as applied to one or more parcels within the overall area subject to the ordinance or regulation, but valid as to others.

[13] Section 66499.37 was amended in 1980 to reduce the limitations period from 180 days to 90 days. Elsewhere in that legislation the Legislature explained that changes in the law were needed to expedite the permit process and thereby encourage the development

(continued)

When the gravamen of the cause of action is a claim that a land use ordinance or regulation enacted under the authority of the Subdivision Map Act, or administrative actions taken pursuant to such an ordinance or regulation, has had the effect of "taking" the plaintiff's property without compensation, the action necessarily challenges the validity either of the ordinance or regulation or of the acts taken by the local agency or appeal board pursuant to the ordinance or regulation. This follows because, as we have explained above, only if the ordinance or regulation would be invalid on its face or as applied unless compensation is paid to an affected landowner, is a claim in inverse condemnation meritorious. Therefore, the constitutional validity of the ordinance as it affects the plaintiff's property must be litigated in any inverse condemnation action which does not allege that a taking has already been judicially established.

Section 66499.37 mandates that: "*Any* action or proceeding *to attack, review, . . . the decision of an advisory agency, appeal board or legislative body concerning a subdivision, . . .* or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations." (Italics added.)

This section is not, as plaintiff argues, limited to actions for specific relief. It includes actions for

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(fn. continued)
of new housing. (Stats. 1980, ch. 1152, § 10 et seq., p. 3796; see now Gov. Code, § 65913.)

compensation for a regulatory taking because the validity of the ordinance or its application to the plaintiff's property, if uncompensated, must be determined in the action — i.e., the court must determine if there has been a taking. Before he or she is entitled to any relief, either compensation or exemption of the property from the development restriction, the plaintiff must establish that the ordinance, regulation, or administrative action is not lawful or constitutionally valid if no compensation is paid. The action therefore comes within the broad language of section 66499.37.

Had plaintiff exhausted his administrative remedies by first seeking a variance and pursuing an administrative appeal challenging the permit conditions, and made his claim that the administrative actions constituted a taking in a petition for writ of mandate seeking review of the agency action filed pursuant to Code of Civil Procedure section 1094.5,[14] the application of section 66499.37 could not be questioned. His action would be one to attack a decision of an appeal board, or if no administrative appeal is available under the Glendale ordinance, an action of the administrative agency, concerning a subdivision, and the act done prior to that decision. It would clearly be an action to determine the validity of the permit conditions.[15] A plaintiff may not

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[14] See *South Coast Regional Com. v. Gordon* (1977) 18 Cal.3d 832; *State of California v. Superior Court (Veta), supra,* 12 Cal.3d 237; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 ["[T]he rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act."].

[15] Glendale might have demurred on the basis that plaintiff failed to state a cause of action, the omission being the absence of allegations that administrative remedies had been exhausted or to establish an exception to that requirement. (See *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 384; *Contra*

(continued)

avoid the application of section 66499.37 by electing to forego raising his claim in the administrative mandamus proceeding in which the owner must exhaust administrative remedies for an erroneous, excessive, or unreasonable restriction on development. If the taking claim is not asserted in that proceeding, the challenge to the validity of the administrative action must be resolved in the inverse condemnation action in order to determine if compensation is due, and to allow the administrative agency or local government the opportunity to rescind the land use restriction or its application to the plaintiff's property. A court cannot determine that compensation is due on allegations like those of plaintiff's complaint without determining if the development restriction is a taking. It must, necessarily, rule on the validity of the ordinance, regulation, or administrative act under which development is restricted.

In sum, when there has been no prior determination that the plaintiff's property has been taken by virtue of governmental action authorized by the Subdivision Map Act, a court hearing an inverse condemnation action based on that action must determine whether, on its face or as applied, the ordinance or regulation would be invalid if the property owner is not compensated for the claimed taking.

The gravamen of plaintiff's cause of action is therefore a claim that the Glendale ordinance is invalid on its face or as applied because, through the authority of that ordinance and/or regulations enacted under it, the city has taken his property without compensation. Plaintiff cannot transform the action into one which does not challenge the validity of the ordinance, regulations, and administrative actions by acquiescing in the taking,

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(fn. continued)
Costa v. California (1986) 177 Cal.App.3d 262.)

assuming the validity of those actions, and seeking only damages. The election is not his, but the city's. Under a cause of action such as that stated by the complaint in this case, regardless of the title attached to the cause of action or the remedy sought, the plaintiff must prove that the ordinance and regulations as applied have worked a "taking" of the plaintiff's property and that the plaintiff has not been compensated.

Viewed from this perspective it is apparent that section 66499.37 governs the time within which this action should have been initiated. Both the statutory language and the legislative history of the section lead to a conclusion that this section, not Code of Civil Procedure sections 318 and 319, is applicable.

Every appellate decision which has considered the issue in a case involving a controversy related to a subdivision has held that section 66499.37 is applicable no matter what the form of the action. (See *Presenting Jamul v. Board of Supervisors* (1991) 231 Cal.App.3d 665 [declaratory relief action challenging denial of request to toll expiration date of tentative subdivision map]; *Hunt v. County of Shasta, supra,* 225 Cal.App.3d 432, 442 [action for declaratory relief that subdivision parcels complied with Subdivision Map Act and mandate to compel issuance of certificate of compliance]; *Griffis v. County of Mono, supra,* 163 Cal.App.3d 414 [action challenging approval of final subdivision map]; *Kirk v. County of San Luis Obispo* (1984) 156 Cal.App.3d 453 [action to compel issuance of certificate of compliance with Subdivision Map Act]; *Soderling v. City of Santa Monica, supra,* 142 Cal.App.3d 501 [mandate to compel city to approve final subdivision maps]; *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800 [action for mandamus and injunctive relief challenging county's approval of land division]; *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d

334 [consolidated mandate and declaratory relief actions challenging approval of tentative maps for two subdivisions]; *Kriebel v. City Council* (1980) 112 Cal.App.3d 693 [mandate challenging action approving neighboring residential development]; *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 886 [action to invalidate resolution permitting imposition of school impact fee condition on building permits and to recover fees].

As the court held in *Timberidge Enterprises, Inc. v. City of Santa Rosa, supra*, 86 Cal.App.3d 873, 886, the "clear language" of section 66499.37 "manifests a legislative purpose that a *decision* such as that of the City, approving a subdivision map and attaching a *condition* thereto, shall be judicially attacked within [the limitation period of section 66499.37], or not at all." (Original italics.)

The purpose of statutes and rules which require that attacks on land use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for those actions and actions which challenge the validity of land use statutes, regulations, and/or decisions is to permit and promote sound fiscal planning by state and local governmental entities. As the Court of Appeal explained in *Patrick Media Group, Inc. v. California Coastal Com., supra*, 9 Cal.App.4th 592, 612:

"The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternative of changing a decision for which compensation might be required. If no such early opportunity were given, and instead, persons were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the

theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible."

And, as the court observed in *California Coastal Com. v. Superior Court (Ham), supra*, 210 Cal.App.3d 1488, 1496, if an owner were permitted to bypass the administrative mandamus remedy and delay initiating an inverse condemnation action for almost five years "[i]n given cases and certainly in the aggregate, the financial burden on the state could be overwhelming." Although the 90-day limitation period is short, it is, as was the 60-day review period of Public Resources Code section 30801 at issue in *Ham*, the period "operates less as a limitations period and more as a time limit for seeking review of the ruling of another tribunal. . . . Where review is sought of a Commission decision, there is no question when the 60-day period begins to run. The property owner has no need to 'discover' anything. . . . [T]he Legislature had every reason to conclude that 60 days provides ample time for a property owner to decide whether to challenge an adverse Commission decision." (210 Cal.App.4th at pp. 1496-1497, fn. omitted.) The same may be said of section 66499.37 and actions seeking review of local agency decisions applying land use regulations.

Section 66499.37 is not unique in establishing a requirement that challenges to the actions of an administrative agency be brought promptly. In addition to that section and Public Resources Code section 30801, the following statues establish such requirements: Code of Civil Procedure section 1094.5 [administrative mandamus — 90 days]; Public Resources Code section 21167 [California Environmental Quality Act decisions — 30-180 days]; Government Code sections 65901, 65903, 65907 — variances, conditional use and permits, board of zoning adjustment — 90 days].

Section 66499.37 governs this action.

D. Other Claims

Plaintiff argues for the first time in this court that it was error to sustain Glendale's demurrer without leave to amend because, had leave been granted, he could have added allegations that the tentative subdivision maps for the property were filed on October 1, 1986; he sold the property on December 21, 1986, and the final subdivision maps were approved on or about October 19, 1988, and April 27, 1989. This argument was not made in the Court of Appeal and is not among the issues presented in the petition for review. Moreover, we fail to see how such amendment would have stated a cause of action. If there were a compensable taking of an interest plaintiff had in the land, it must necessarily have occurred before he sold the property.

Plaintiff's theory may be that a landowner may convert his rights to challenge an uncompensated regulatory taking into an inverse condemnation action by selling the property before seeking administrative relief, either without applying for a development permit or during the permit process. We disagree for the reasons stated above. A court cannot determine if application of a land use restriction will constitute a taking until a final administrative decision has been made regarding the use of the property. A potential diminution of value as a result of rezoning or land use restrictions is not necessarily a taking.

Plaintiff also claims that the right to sue in inverse condemnation for regulatory takings had been abolished in California as a result of this court's holding in *Agins v. City of Tiburon, supra*, 24 Cal.3d 266, and was not revived until the decision in *First Lutheran Church v. Los Angeles, supra*, 482 U.S. 304, "overruled" *Agins* in

1987. That assertion not only misstates the impact of *First Lutheran Church*, but assumes that plaintiff had a right to initiate an action in inverse condemnation without first challenging the development restrictions of which he complains. As we have shown above, that assumption is unwarranted. Nothing in *Agins* precluded an action challenging application of the Glendale ordinance to plaintiff's property, or seeking damages in an inverse condemnation action if the ordinance was found to be invalid absent compensation and the city nonetheless denied plaintiff the right to develop the ridge line property. Plaintiff had a remedy by which he could have avoided the restrictions brought about by the Glendale ordinance or obtain compensation for their imposition *if their impact constituted a taking* unless compensation was paid. He elected to forego both a judicial determination that the restrictions would constitute a compensable taking, and the remedy the state provides.

III

DISPOSITION

The judgment of the Court of Appeal is affirmed.

BAXTER, J.

WE CONCUR:

Lucas, C.J.
Mosk, J.
Kennard, J.
Arabian, J.
George, J.
Anderson, J.*

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* Hon. Carl West Anderson, Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

APPENDIX B

SECOND APPELLATE DISTRICT
DIVISION FOUR, No. B052246
S032210

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

Supreme Court
FILED
SEP 22 1994
Robert Wandruff, Clerk
P. Quinn
Deputy

R. R. HENSLER, Appellant
v.
CITY OF GLENDALE, Respondent

Petition for rehearing DENIED.

Opinion modified.

/s/ Mosk
Acting Chief Justice

IN THE SUPREME COURT OF CALIFORNIA

Supreme Court
FILED
SEP 22 1994
Robert Wandruff, Clerk

R. R. HENSLER,
Plaintiff and Appellant,
v.
CITY OF GLENDALE,
Defendant and Respondent.

S032210
Ct. App. 052246
Super. Ct. No. NCC41335

MODIFICATION OF OPINION

THE COURT:

The opinion herein, appearing at 8 Cal.4th 1, is modified as follows:

On page 9, delete footnote 4 and substitute the following:

"Plaintiff relies on both article 1, section 19 of the California Constitution and the takings clause of the Fifth Amendment to the United States Constitution. He relies primarily on federal authority, however. While article I, section 19, protects a somewhat broader range of property values than does the Fifth Amendment

takings clause (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 298), that distinction is irrelevant to the issues in this case. Our conclusion that the prerequisites to an inverse condemnation action arising out of a regulatory taking do not deny landowners any rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution applies equally to rights claimed under article I, section 19."

This modification does not affect the judgment.

APPENDIX C

CERTIFIED FOR PUBLICATION

CALENDARED 3/4/93 JC

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

Court of Appeal - Second Dist.
FILED
MAR 3 1993
Joseph A. Lane, Clerk

Deputy Clerk

R. R. HENSLER,
Plaintiff and Appellant,
v.
CITY OF GLENDALE,
Defendant and Respondent.

B052246
(Super. Ct. No. NCC41335)

APPEAL from a judgment (order of dismissal) of the Los Angeles Superior Court, Joseph R. Kalin, Judge. Affirmed.

Crosby, Heafey, Roach & May, Gideon Kanner, and M. Reed Hunter for Plaintiff and Appellant.

Scott H. Howard, City Attorney, Freilich, Stone, Leitner & Carlisle, Freilich, Kaufman, Fox & Sohagi, Benjamin Kaufman, and Robert H. Freilich for Defendant and Respondent.

Statement of the Case

Plaintiff R. R. Hensler sued defendant City of Glendale for inverse condemnation of a tract of land based on the City's enactment of an ordinance precluding the development of a portion of Hensler's property by prohibiting construction along identified major ridge line areas. The City demurred on several grounds, including statutes of limitations. The trial court sustained the demurrer without leave to amend, and this appeal is from the order of dismissal thereafter entered. We conclude that Hensler's action for inverse condemnation is time barred as a matter of law and therefore affirm.[1]

Statement of Facts

As set forth in Hensler's complaint and its exhibits, the pertinent facts are as follows:

In 1978, Hensler purchased a 300 acre tract of land in the City of Glendale. He purchased the tract intending to develop it consistent with the zoning then in effect which contained no prohibitions other than a restriction limiting development to single-family dwellings. Later in the same year, Hensler submitted plans to the City for approval but a dispute arose about an Environmental Impact Report and Hensler temporarily abated his development activity.

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[1] The trial court's order recited: "The action is barred by the statute of limitations; plaintiff has waived any challenge to the conditions of the subdivision approval; plaintiff has failed to allege facts sufficient to constitute a 'taking' of property without just compensation and, as a matter of law, plaintiff has not been deprived of substantially all reasonable use of his property." Because our determination of this appeal is based solely on the statute of limitations, we do not address the other issues.

In March 1981, the City added section 28-2.1 to the Glendale Municipal Code. The ordinance prohibited the location of any "man-made features [on any of the] major ridge lines"[2] and thereby foreclosed Hensler from development of approximately 40 percent of his property. As authority for the enactment of the ordinance, section 28-3 of the Glendale Municipal Code recites that enactment of the ordinance is pursuant to "sections 8j and 11 of article XI of the Constitution of California and the Subdivision Map Act, Division 2 of Title 7, of the Government Code (commencing with § 66410) of the State of California."

Between June 1983 and July 1984, Hensler submitted three different plans for the development of the tract. During this same period, representatives of the City informed Hensler that any submittal which included development of the major ridge lines would be rejected.

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[2] Glendale Municipal Code (Major Ridge Line Ordinance) section 28-2.1 provides in pertinent part: "(a) Intent and purpose. The city is experiencing unprecedented hillside subdivision development which without proper planning may destroy major ridge lines which are an exhaustible and precious scenic resource of the city and its citizens; it is necessary that subdivision developers include with their tentative tract maps, plans for the preservation of major ridge lines. [¶] (b) Submission of plans. The tentative tract map and plans for any subdivision development which touches, crosses, includes or effects major ridge lines shall include plans for the complete preservation of such major ridge line areas in their natural state. [¶] (c) Major ridge lines defined. A major ridge line shall be any ridge line in the city of Glendale so designated as 'major ridges' on Sheet Nos. OC, OD, IC, ID, 4A, 4B, 4C, 5B, 5C, 5D, 6B, 6C, 6D, 6E, 6F, 7B, 7C, 7D, 7E, 7F, 8C, 8D, 8E, 9E, 9F, 9G, 10E, 10F, and 10G of the Glendale, Los Angeles County, California, Metropolitan Area two hundred (200) scale topographic maps which are attached hereto, incorporated herein and by this reference made a part hereof. No engineered slopes, housing construction, streets, utilities, or other man-made features shall be permitted within identified major ridge line areas. . . ."

The ordinance expressly identified and incorporated by reference sheets (maps) designating the affected major ridge lines and the tentative tract maps and plans submitted by Hensler were required to include plans for the complete preservation of the major ridge lines in their natural state. On April 1, 1986, the City approved Hensler's plans for a 596-unit planned residential development, downsized to 588 units, and rejected all proposed use and any encroachment within, on, or over the major ridge lines within the tract.[3]

In September 1989, Hensler filed his complaint for inverse condemnation, seeking damages of $10 million. He alleged that the prohibition of any development on the major ridge lines constituted a compensable taking under the state and federal Constitutions because such proscription rendered approximately 40 percent of his property economically and beneficially useless.

Discussion of Applicable Statute of Limitations

The parties debate at great length the applicable statute of limitations. Generally, an inverse condemnation action based upon *damage* to property must be filed within three years of discovery of the damage (Code Civ. Proc., § 338, subd. (j)), while an action based upon a *taking* of property generally is to be filed within five years of the taking. (Code Civ. Proc., §§ 318 and 319.) But neither statute applies here because Hensler's claim is based upon a decision made by the City pursuant to an ordinance enacted under the authority of the Subdivision

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[3] Hensler subsequently sold his interest in the property to entities which completed much of the development. Hensler's sale does not bar him from seeking damages for the amount by which his selling price was reduced by the alleged taking. (*City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 389.)

Map Act, making the 90-day limitations period of Government Code section 66499.37 controlling.[4]

Government Code section 66499.37 is part of the Subdivision Map Act. (Gov. Code, § 66410 et seq.) It appears in chapter 7 of the Act, which is entitled "Enforcement and Judicial Review." In pertinent part, the statute requires that "[a]ny action or proceeding to attack, review, set aside, void or annul the decision of . . . [a] legislative body concerning a subdivision . . . or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced . . . within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding . . . ."

The statute by its terms applies to "[a]ny action or proceeding" and is not limited to actions for administrative mandate under Code of Civil Procedure section 1094.5. Accordingly, its 90-day time limit has been interpreted to apply to an action for declaratory relief challenging a board of supervisors' denial of a request to toll the expiration date of a tentative subdivision map (*Presenting Jamul v. Board of Supervisors* (1991) 231

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[4] Government Code section 66499.37 provides: "Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings."

Cal.App.3d 665 [review den.]) and to an action seeking both to declare unconstitutional a policy requiring the payment of "school impact fees" as a condition of approval of a subdivision map and to recoup fees already paid. (*Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873.)

The City enacted the ordinance prohibiting development on the major ridge lines pursuant to the authority granted to it by the Subdivision Map Act. (Glendale Mun. Code, § 28-3.) As alleged in Hensler's complaint, the predicate of his inverse condemnation action is "[t]he enactment of the Major Ridgeline Ordinance, and its subsequent actions upon plaintiff's plan of development conditioned on no development of the Affected Property . . . ." Because Government Code section 66499.37 specifically speaks to controversies arising out of the Subdivision Map Act regardless of how the action is framed or characterized, it necessarily prevails over the more general statute of limitations found in the Code of Civil Procedure. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 443, fn. 9.) It follows that Hensler's inverse condemnation action is governed by Government Code section 66499.37.

Policy for Time Bar for Constitutional Challenge to Subdivision Approval

Although Hensler's complaint raises a claim of a serious impairment of a constitutional right, "even a constitutional right is subject to reasonable statutory periods of limitation within which to commence an action for its vindication." (*Timberidge Enterprises, Inc. v. City of Santa Rosa, supra*, 86 Cal.App.3d at p. 886.) Hensler does not quarrel with this fundamental proposition but he contends that only a very liberal application of the five-year statute is constitutionally

permissible in this case. We do not agree. " 'The power of the Legislature to provide reasonable periods of limitation is unquestioned and the fixing of time limits within which particular rights must be asserted is a matter of legislative policy. . . . The only restriction as to the legislative power with respect to a statute of limitations is that it must not be so manifestly inequitable as to amount to a denial of justice, and unless such is the case, its determination is final.' [Citation.] Under this criteria, the [90-day] period of limitations of Government Code section 66499.37 is manifestly reasonable." (*Timberidge Enterprises, Inc. v. City of Santa Rosa, supra*, 86 Cal.App.3d at pp. 886-887.)[5] The legislative intent in requiring swift action by the aggrieved party is to expedite, consistent with the requirements of due process of law, judicial review of Subdivision Map Act controversies. (*Presenting Jamul v. Board of Supervisors, supra*, 231 Cal.App.3d at pp. 671-672, and cases cited therein.)

In *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, the court explained the solid policy concerns for requiring a litigant to first raise a claim of inverse condemnation by way of administrative mandamus when the claim arises out of a challenge to administrative actions. In the context of regulating and approving subdivisions the same policy reasons are applicable. The City must be able to "plan its actions in the public interest and to make reasonable and responsible allocations of resources that it holds in trust for the public . . . [and] be alerted promptly both when its

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[5] When *Timberidge* was decided, Government Code section 66499.37 provided for a 180-day period. In 1980, the Legislature amended the statute to provide for a 90-day period. (*Kirk v. County of San Luis Obispo* (1984) 156 Cal.App.3d 453, 459, fn. 4.) That change does not affect the vitality of *Timberidge's* conclusion that the statute represents a valid exercise of legislative power.

decisions are questioned, and when, as a result of a particular decision, the agency may be liable for inverse condemnation damages." (At pp. 611-612.) Furthermore if the City is "operating with limited resources [it] may be liable for inverse condemnation damages as a result of a particular decision, the [City] must be afforded an opportunity to change or stay enforcement of the challenged action, remove or modify a challenged condition, or take other action to mitigate the claimed damages if it determines enforcement of its order does not merit the compensation required to be paid. . . . If no such early opportunity were given, and instead, persons were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible. [Citations.]" (*Id.* at pp. 612-613.) The rationale of the *Patrick Media Group* holding is fully applicable here.

Appellant's Delay Falls Within the Operation of Government Code Section 66499.37

According to the allegations in Hensler's complaint, he learned of his right to raise this claim no later than April 1, 1986, when the City approved his plan for a 588-unit development because "[i]n the process of review of the above plans, the defendant City rejected all proposed use and any encroachment within [the major ridge lines on his property]." Hensler had 90 days from the date of that decision to file "*[a]ny action or proceeding* to attack, review, set aside, void or annul the decision . . . or to determine the reasonableness, legality or validity of any condition attached thereto. . . ." (Gov. Code, § 66499.37; emphasis added.) There is no reason

why Hensler could not have brought his action within 90 days after the approval of his plans because the area of his development was specifically definable by reference to the tentative tract map he was required to file and because the absolute and total prohibition of the ordinance results in a present and ascertainable loss.

Contrary to Hensler's claim, this is not a situation in which there was any difficulty in pinpointing the fact of the taking and calculating the resulting damages. This case involves neither a continuing wrong nor a loss which does not materialize until some time after the taking has occurred. (See, e.g., *Pierpont Inn, Inc. v. State of California* (1969) 70 Cal.2d 282, 286-290.) By April 1986, Hensler knew that he would be precluded from developing 40 percent of his land. At that juncture, he knew there had been what he characterizes as "a legislative conversion of 40% of his substantial tract of land into an untouchable public preserve of some sort, and that this [was] a *de facto* taking of the Affected Land . . . which was thus deprived of all reasonable use as a matter of law." (Emphasis in original.) The impact of the City's decision was clear and the nature and extent of Hensler's damages were completely ascertainable. Hensler's failure to bring any action within 90 days after the approval of his subdivision map bars his claim as a matter of law.[6]

---

[6] Because Hensler neither brought an action in administrative mandamus nor filed a complaint for money damages in 1986, we need not address his contentions that recent United States Supreme Court decisions indicate that he would have been required to pursue only the latter option. We do note, however, that current precedent from the California Courts of Appeal have resolved the question adversely to Hensler. (*Patrick Media Group, Inc. v. California Coastal Com., supra*, 9 Cal.App.4th 592, 607-613, relying upon *Preseault v. ICC* (1990) 494 U.S. 1; *Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 656-661 [review den.], cert.

(continued)

Although the United States Supreme Court has held that a property owner cannot be limited to the remedy of invalidation of a regulatory taking (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321-322), it does not follow that a property owner can compel the government to exercise the power of eminent domain. Here the issue is not the form of action implemented by the property owner, but the excessive delay in doing anything. With the passage of time, the City's practical options remaining to accommodate the landowner's claim of taking may have diminished in terms of available resources and the development of other private and public projects. By deferring the commencement of his inverse condemnation action for more than three years after the approval of his subdivision map, Hensler falls squarely within the operation and purpose of Government Code section 66499.37.[7]

(fn. continued)
denied 494 U.S. 1080; and *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1496.)

[7] Between June 28, 1983, and July 24, 1984, Hensler submitted various plans to the City and was advised that any plans that did not comply with the ordinance prohibiting development of the ridge lines would be rejected. On that basis alone, Hensler's claim was arguably barred no later than July 25, 1989, two months prior to the filing of the action. (Code Civ. Proc., §§ 318 and 319.) We do not consider this factor in reaching our decision because the case arises in the context of the Subdivision Map Act and because the date of the approval of the subdivision tract map provides a more definitive and unequivocal point in time for establishing when Hensler's cause of action accrued.

Disposition

The judgment (order of dismissal) is affirmed.

CERTIFIED FOR PUBLICATION

VOGEL (C.S.), J.

We concur:

WOODS (Arleigh), P.J.

STEPHENS, J.*

---

* **Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.**

APPENDIX D

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 4 DATE: 03/25/93

Crosby, Heafey, Roach & May
Gideon Kanner
700 South Flower Street
Suite 2400
Los Angeles, CA 90017

RE: R. R. Hensler
vs.
Glendale, City of
2 Civil B052246
Los Angeles No. NCC41335

THE COURT:

Petition for rehearing denied.

APPENDIX E

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ORIGINAL FILED
MAY 11 1990
County Clerk

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

R. R. HENSLER, an individual,
Plaintiff,
v.
CITY OF GLENDALE, et al.,
Defendants.

No. NCC 41335

ORDER ON DEMURRER TO COMPLAINT

The Demurrer of Defendant, City of Glendale, to the Complaint herein, came on regularly for hearing by the Court on April 16, 1990. The Law Offices of Monteleone and McCrory appeared as counsel for plaintiff, and Scott H. Howard, City Attorney, appeared as counsel for defendant. After hearing, the matter was submitted to the Court, and the Court having read and considered the supporting and opposing points and

authorities, and having heard and considered the arguments of counsel, and good cause appearing therefore,

IT IS ORDERED that the Demurrer be, and hereby is, sustained without leave to amend on all the grounds set forth in Defendant's Demurrer and Reply, including the following issues:

The action is barred by the statute of limitations; plaintiff has waived any challenge to the conditions of the subdivision approval; plaintiff has failed to allege facts sufficient to constitute a "taking" of property without just compensation and, as a matter of law, plaintiff has not been deprived of substantially all reasonable use of his property.

Sanctions as requested by Defendant are denied.
Dated: May 11, 1990

/s/ Joseph R. Kalin
Judge of the Superior Court
Joseph R. Kalin

(2)

No. 94-1124

JAN 23 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

R. R. HENSLER,

Petitioner,

vs.

CITY OF GLENDALE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California, Following Its Unanimous Opinion

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The questions as framed by petitioner seriously misstate the opinion of the California Supreme Court and the issues before this Court. The question presented by this Petition is more properly stated as follows:

> Whether a landowner's regulatory taking claim arising from a condition of subdivision approval, unanimously rejected by the California Supreme Court because the claim is barred by a state statute of limitations, presents a federal question for which this Honorable Court should issue an advisory opinion, merely because the Court's opinion includes an accurate digression discussing the ripeness requirement that is plainly independent from the Courts adequate state law holding.

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No. 94-1124

In The

Supreme Court of the United States

October Term, 1994

R. R. HENSLER,

Petitioner,

vs.

CITY OF GLENDALE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California,
Following Its Unanimous Opinion

RESPONDENT'S BRIEF IN OPPOSITION

The City of Glendale, California (hereafter "City" or "Glendale") respectfully urges this Honorable Court to deny the petition of R.R. Hensler (hereafter "Hensler") for a writ of certiorari to the California Supreme Court to review that Court's unanimous opinion in this cause. Hensler does not, and cannot, show any special or important reason for this Court to review the unanimous decision of the California Supreme Court that Hensler's regulatory taking claim, challenging a condition attached to the City's approval of Hensler's application for a subdivision map, is barred by the statute of limitations set

forth in California Government Code § 66499.37.[1] This is particularly true because Hensler has failed to preserve its federal claim – Hensler has never challenged the constitutionality under the Fifth or Fourteenth Amendments of Government Code § 66499.37, but instead has only litigated below the state law issue of the statute's meaning and application to Hensler's claim.

I.

OPINION BELOW

In addition to the opinions included in the appendix to Hensler's petition, attached to this Brief is the March 23, 1994 order of the California Supreme Court denying the application of "Defenders of Property Rights" for permission to file an amicus curiae brief challenging the constitutionality of Government Code § 66499.37 under the Fifth and Fourteenth Amendments to the United States Constitution, because: "The issue to be argued is outside the scope of issues on which review was granted."[2]

---

[1] Unless otherwise noted, all statutory references are to the official codes of the State of California.

[2] In addition to the issues raised by Hensler, Defenders of Property Rights sought leave to argue that Government Code § 66499.37 violated the United States Constitution, claiming: "While a legislature may enact statutes of limitations governing citizens' rights, such statutes must allow the citizen a reasonable time in which to sue to protect his rights. If a statute does not provide a reasonable time to sue, it is unconstitutional." Proposed Amicus Brief, p. 14. Due to the length of this brief, and the fact that it was not accepted by the California Supreme Court, the City has not attached it as an appendix, but would be pleased to make it available to this Court if requested.

II.

JURISDICTION

The City does not concede that this Court has jurisdiction under 28 U.S.C. § 1257(a) to grant certiorari to address a matter of exclusive state concern; *i.e.*, the interpretation of the statute of limitations set forth in Government Code § 66499.37 and its application to challenges to subdivision related decisions filed in the California court system. *See, Agins v. Tiburon*, 447 U.S. 255, 259, n.6 (1980). This is particularly true in the case at bar, because Hensler did not below, and has not in its petition, challenged the constitutionality of Government Code § 66499.37 under the United States Constitution.

III.

STATUTE INVOLVED

Government Code § 66499.37, originally adopted by the California Legislature in 1965 and last amended in 1980 to cut the limitations period in half,[3] provides in full that:

> Any action or proceeding to attack, review, set aside or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by

[3] Appendix A to the Petition, at A-28, n.13.

> any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such action. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.

Hensler's complaint, claiming inverse condemnation solely under Article I, Section 19 of the California Constitution, was filed in September 1989 in the Superior Court of the State of California, County of Los Angeles, nearly 3½ years after the approval of the City Council of Glendale of Hensler's subdivision application.

IV.

STATEMENT OF THE CASE

A. The Underlying Facts

Glendale is the third largest of the 84 cities in Los Angeles County, with a population of over 180,000. *United States Census of Population and Housing, 1960 Through 1990.* After a modest increase of only 6,300 people throughout the 1970's, the City allowed rapid residential growth to take place throughout the 1980's. *Id.* Glendale's population of 139,060 in 1980 increased 29.5% during the decade. *Id.*

In March of 1981 the City enacted its "Major Ridge Line Ordinance" (hereafter "Ridge Line Ordinance"),

which prohibited construction of homes on designated, major ridge lines within the City. Appendix A at A-3 and n.2; Appendix C at C-3 and n.2.[4] The Ridge Line Ordinance "was enacted pursuant to the authority granted by the Subdivision Map Act." Appendix A at A-2 n.2. The Ridge Line Ordinance codified a condition previously imposed on Hensler in a prior application for subdivision approval (and accepted by Hensler at that time, see footnote 7, *infra*) and expanded it City-wide by requiring, with certain exceptions, developers of properties containing major ridge lines to preserve these ridge lines as open space. The Ridge Line Ordinance states that its intent and purpose is as follows:

> The city is experiencing unprecedented hillside subdivision development which without proper planning may destroy major ridge lines which are an exhaustible and precious scenic resource of the city and its citizens; it is necessary that subdivision developers include with their tentative tract maps, plans for the preservation of major ridge lines.

Section 28-2.1(a), quoted at Appendix A, A-3 n.2.[5]

The Ridge Line Ordinance regulates development of "engineered slopes, housing construction, streets, utilities, or other man-made features" with areas designated as "major ridge line areas" by the ordinance. *Id.* Section

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[4] All references to Appendix A, B, C or E are to the underlying opinions attached as appendices to the petition.

[5] Not coincidentally, this language is similar to the ordinance of the Town of Tiburon approved just prior to Glendale's action by this Honorable Court in *Agins v. Tiburon*, *supra*, 447 U.S. at 261, n.8.

28.2.1(d) authorizes certain exceptions for public roadways necessary to aid traffic circulation, provide emergency access or egress, or otherwise promote public health, safety and general welfare. Hensler alleged that the Ridge Line Ordinance barred development on forty percent (40%) of Hensler's property, referred to by Hensler as the "Affected Property."[6] Appendix A at A-4, Appendix C at C-3.

After "temporarily abating" development plans for twenty months after the court's decision in *Stevens v. City of Glendale*, 125 Cal.App.3d 986, 990 (1981),[7] between June

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[6] Hensler's complaint states that " . . . by virtue of [the Ridge Line Ordinance] defendant City sought to prohibit all developments of major ridge lines, including those upon plaintiff's property, which constituted approximately 40% of the total area of all the property ('Affected Property')." Hensler's complaint ¶ 7.

[7] The Hensler property at issue in this action has been one of the most controversial properties in the City of Glendale over the last 20 years. Three times over the last twenty years Hensler has made application to the City to develop his property and three times the City has approved Hensler's permit application. Unfortunately, after each approval the City has been sued in an action that resulted in a published opinion. The first two lawsuits were actions brought pursuant to the California Environmental Quality Act or CEQA (Public Resources Code section 21000, *et seq.*) by neighbors of Hensler attempting to thwart development of the Hensler property, while this third action has been brought by Hensler who after subdividing and selling his property now seeks to challenge conditions of the City's subdivision approval as a taking under California law.

The first action challenged the Environmental Impact Report (EIR) prepared by the City for a project to fill canyons on Hensler's property with over one and one-half (1½) million cubic yards of dirt left over from construction of a state highway

28, 1983 and July 24, 1984, Hensler alleged that he submitted three different development plans to the City, again proposing the construction of residential units on

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(Highway 2) that Hensler and others were constructing, together with the grading of an additional 343,000 cubic yards of dirt to form a road connecting the "leveled" Hensler property with adjacent subdivisions. *Day v. City of Glendale*, 51 Cal.App.3d 817, 819-20 (1975). The Court of Appeal ruled that Glendale had to prepare an EIR, stating, "the issuance of a grading permit is the only point at which the environmental impact of the project may be publicly considered before mountains are moved and 70 acres of canyon are filled." *Id.* However, because no stay was ever requested in the action, the grading was substantially completed prior to the finality of the court's ruling. *Id.* The issue of the connecting road was to be revisited in the next lawsuit against the City involving Hensler's property.

Only fifteen months after the appellate court decision in *Day* was final, Hensler and his partner on March 25, 1977, filed an application for a tentative subdivision map (Government Code section 66452) with the City to construct 830 homes on the now 309 acres of property they had acquired in the San Rafael Hills (the same 309 acres at issue in the case at bar). *Stevens v. City of Glendale, supra*, 125 Cal.App.3d at 990. A draft EIR was completed by the City on June 13, 1978, and after public hearing on December 12, 1978 a final EIR was certified and the tentative tract map was approved. *Id.* at 990-91. Mr. Stevens, joined by a homeowners' group, the Chevy Chase Estates Association, challenged both the City's approval of the tentative tract map and the City's compliance with CEQA.

In approving the project, the City added three "mitigation measures" which the court found "substantially lessened or avoided significant environmental impacts of the project." *Stevens*, 125 Cal.App.3d at 995. These mitigation measures included the extension of a street into a neighboring community, reduction in density to 640 units, and ***"that the primary ridgeline in the project be retained in a natural state."*** *Id.* at 990 (emphasis added). Hensler agreed at that time to these

the tract. Appendix C at C-3. During this same period, over five years before filing the case at bar, Hensler alleges that he was advised by City representatives that any application to develop the ridge line "Affected Property" would be rejected and would be futile. Appendix A at A-4; Appendix C at C-3.

The City approved the third of Hensler's development proposals (after slightly reducing the density from 596 units to 588 units) on April 1, 1986. Appendix A at A-4; Appendix C at C-3. Hensler alleges that pursuant to the Ridge Line Ordinance, the City's approval of Hensler's tentative subdivision map was conditioned by a ban on home construction in the forty percent (40%) of the property labelled as the "Affected Property." The

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conditions and indeed, participated as real party in interest in defending the City's decisions. *Id.* at 989.

In approving the City's condition maintaining the primary ridge line, the court relied upon the City's 1978 amendment to the housing element of its General Plan, and its open space, recreation and conservation element. The court quoted the following portion of the City's General Plan:

> The project, which is the subject of this action, is located in the community designated as "the San Rafael Hills." The open space plan states: "One of the priorities for the San Rafael Hills, as for the Verdugo Mountains, will be the preservation of the ridge lines."

Stevens, 125 Cal.App.3d at 994.

The matter was remanded to the trial court in November of 1981, with directions that the City give notice in compliance with CEQA of the mitigation measure to extend the connecting "A" Street to neighboring properties. At that time, according to the complaint rather than continue with his application in the face of community disapproval, Hensler "temporarily abated" his attempt to develop on the property. Appendix C at C-2.

complaint attached and incorporated by reference as Exhibit 1 Hensler's approved tentative tract map showing the 588 subdivided lots, internal streets and improvements and the "Affected Property."[8] Later, after receiving this final approval, Hensler sold his property to third parties which completed construction of the subdivision development. Appendix C at C-4, n.3.

On September 28, 1989, almost three and one-half (3½) years after the City's approval of this major development proposal, and eight and one-half (8½) years after enactment of the Ridge Line Ordinance, Hensler filed this lawsuit in California state court.[9] Hensler alleges that the City's regulation on development of the "Affected Property" constituted a compensable taking under the California Constitution.

B. Underlying Court Proceedings

The trial court, appellate court and California Supreme Court, without a single judge or justice in dissent, has each held that this action was barred by

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[8] This Exhibit 1 clearly shows that one of the two roads providing needed access to the 588 homes in Hensler's subdivision was cut through the Major Ridge Line. This road is referred to as "A" Street in the *Stevens* opinion. 125 Cal.App.3d at 990.

[9] The *Stevens* opinion further demonstrates that the protection of the ridge line on Hensler's property was a long time goal of the City's General Plan and that no later than 1978, 11 years before filing the instant action, Hensler knew (and accepted) the fact that any approval of a subdivision on his property would be conditioned on not building homes on the Affected Property. 125 Cal.App.3d at 990.

California's statute of limitations governing challenges to local government's subdivision decisions.

After Hensler filed his complaint for inverse condemnation under the California Constitution on September 28, 1989, a hearing on the City's demurrer to Hensler's complaint was held on April 16, 1990. On May 11, 1990, the California Superior Court sustained the City's demurrer without leave to amend, holding that Hensler's complaint was fatally defective for the reasons set forth in the City's demurrer, including the following:

1. "The action is barred by the statute of limitations";

2. Hensler "has waived any challenge to the conditions of the subdivision approval";

3. Hensler "has failed to allege facts sufficient to constitute a 'taking' of property without just compensation"; and

4. "As a matter of law, [Hensler] has not been deprived of substantially all reasonable use of his property." Appendix E at E-1 to E-2.

Hensler appealed this order and subsequent judgment. Each of the four rulings made by the trial court was fully briefed by both Hensler and the City. On March 3, 1993, the Court of Appeal for the Second District, Division Four, issued its unanimous opinion affirming the Superior Court's judgment.[10] Hensler's petition for

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[10] In light of its decision holding that Hensler's lawsuit was time-barred, neither appellate ruling addressed these other

rehearing was denied on March 25, 1993. Hensler's petition for review to the California Supreme Court followed and was granted on May 27, 1993.

The California Supreme Court unanimously affirmed the appellate court's opinion on July 25, 1994 (Appendix A) and denied Hensler's petition for rehearing on September 22, 1994 (Appendix B).

In reaching its decision, the California Supreme Court thought equally important the matters that Hensler's complaint tacitly admits, including the following:

a. "The complaint does not allege facts to establish that title to the land was affected by enactment of the ordinance or that a physical invasion of the land took place."[11] Appendix A at A-27.

b. The complaint "does not allege that a taking has already been judicially established." Appendix A at A-29.

c. Hensler's "complaint acknowledges that development has been permitted on part of his property, and thus concedes that the Glendale ordinance did not

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issues. Appendix A at A-4 to A-5, n.3; Appendix C at C-3, n.1; *but see* Appendix A at A-20 to A-21 (waiver of taking claim).

[11] This fact distinguishes the case at bar from *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994), and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979), because Hensler has no claim that the City's condition involves a "requirement that [he] deed portion of property to the city" (*Dolan*) or that it "extinguishes a fundamental attribute of ownership" (*Kaiser*).

deny him all economically feasible use of the property."[12] Appendix A at A-11.

All three courts that have reviewed Hensler's complaint have agreed that its fatal flaw is Hensler's failure to seek any judicial review for such a long period, whether one counts the eight years from the adoption of the Ridge Line Ordinance or the nearly 3½ years from the imposition of the condition of approval on Hensler's subdivision prohibiting construction of buildings in the Affected Property. With not a single dissent these jurists have held that Hensler's claim is barred under state law by his failure to comply with Government Code § 66499.37.

V.

REASONS FOR DENYING THE WRIT

The City respectfully submits that this case clearly does not warrant review by this Honorable Court, for the following reasons.

1. The California Supreme Court's unanimous opinion in this case was based on exclusive and adequate

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[12] *See, Dolan v. City of Tigard, supra,* 114 S.Ct. at 2316, n.6 ("There can be no argument that the permit conditions deprive petitioner 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property.") (citations omitted).

state grounds, *i.e.*, the application of the statute of limitations contained in Government Code § 66499.37 to regulatory takings challenges of subdivision decisions applying ordinances adopted pursuant to the Subdivision Map Act. This was the sole issue before the Court and its sole holding. Or, as the appellate court stated in its opinion, "Here the issue is not the form of action implemented by the property owner, ***but his excessive delay in doing anything***." Appendix C at C-10 (emphasis added).

2. Despite Hensler's claim to the contrary, the California Supreme Court did not hold that a landowner complaining of an uncompensated regulatory taking is required to file an action seeking a writ of administrative mandate, as Hensler claims. Petition, at 14-15. Instead, the Court was quite clear that it was not adding a new judicial hurdle to landowners, but was simply holding that a regulatory taking claim based upon a condition of subdivision approval must be brought within 90 days of the decision, "whether or not" it is filed separately or joined with an action for a writ of administrative mandate. Appendix A at A-1

3. The California Supreme Court's précis of this Honorable Court's regulatory takings precedents does not create new hurdles to landowners, as Hensler claims, but rather simply reiterates the ripeness requirement laid down by this Court in a number of land use decisions over the last fifteen years.

A. The California Supreme Court's Unanimous Opinion In This Case Rests On Adequate State Grounds And Thus Does Not Raise A Federal Question Appropriate For Review By This Court

Hensler's Petition ignores the fact that the California Supreme Court's unanimous opinion sustaining Glendale's demurrer was based upon the Court's interpretation of Government Code § 66499.37. It is submitted that Hensler's objection to the California Supreme Court's application of state law does not raise a federal question appropriate for review by this Honorable Court. *E.g., Agins, supra,* 447 U.S. at 259, n.6.

1. This Court Should Not Exercise Discretionary Jurisdiction When A State Court Opinion Plainly Rests On Adequate State Grounds

This Court has long held that it will not review a state court judgment based upon an adequate and independent state ground, even though a federal question was also involved and it is claimed that it was wrongly decided. *E.g., Murdock v. Memphis,* 87 U.S. 590, 636 (1874); *Michigan v. Long,* 463 U.S. 1032, 1041-42 (1983).

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render

> an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Every judge or justice who has ever reviewed Hensler's complaint has concluded it is time barred by Government Code § 66499.37, and would undoubtedly do so again even if this Court accepted this case for review and reversed the State Court's judgment for further proceedings. It is respectfully submitted that this Court should not issue to Hensler an advisory opinion that cannot have an effect on the judgment in this case.

2. The California Supreme Court's Unanimous Opinion In This Case Plainly Rests On Its Interpretation Of A California Statute of Limitations

The California Supreme Court's unanimous opinion in this matter makes clear that its ruling is based upon its interpretation of a matter of state law – which statute of limitations applies in this action. Below, Hensler asserted that either the five or three year "catch all" statute of limitations set forth in Code of Civil Procedure §§ 318, 319 or 338 governed his claim.[13] Based solely on its interpretation of California statutory and case law, the Court held:

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[13] The Court had no problem rejecting Hensler's claim that "a new cause of action arises each day the city fails to compensate him" because landowners "cannot know the point in time at which the taking occurs and the statute of limitations commences running." Appendix A at A-24. The Court pointed out

Plaintiff argues alternatively that Code of Civil Procedure sections 318, 319, or 338 apply. They do not. They are applicable only if no "different limitation is prescribed by statute." (Code Civ. Proc., § 312.) Government Code section 66499.37 is a "different limitation" which now governs actions in which such issues are raised.

* * *

"The 'patent legislative objective' of [section 66499.37] is to ensure that judicial resolution of Subdivision Map Act disputes occurs 'as expeditiously as is consistent with the requirements of due process of law.' " (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 442.) As the Court of Appeal recognized here and in *Hunt*, section 66499.37 applies by its terms to ***any*** action involving a controversy over or arising out of the Subdivision Map Act. Therefore, if this is a claim arising out of application of a land use regulation authorized by that act, section 66499.37 applies. Plaintiff seeks to avoid application of section 66499.37 by arguing he does not challenge the validity of the Glendale ordinance. He seeks only compensation for the taking he alleges was effected by the ordinance. He contends on that basis that the statutes of

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that (1) the case relied upon by Hensler was a ***physical*** taking case (*id.* at A-25), and (2) "if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision," which in Hensler's case was nearly 3½ years prior to the filing of the action (*id.* (footnote omitted)).

> limitation found in the Code of Civil Procedure govern this action. We disagree.

Appendix A at A-26.

The Court, relying solely on legislative intent and California appellate rulings interpreting Government Code § 66499.37,[14] held that:

> When the gravamen of the cause of action is a claim that a land use ordinance or regulation enacted under the authority of the Subdivision Map Act, or administrative actions taken pursuant to such an ordinance or regulation, has had the effect of "taking" the plaintiff's property without compensation, the action necessarily challenges the validity either of the ordinance or regulation or of the acts taken by the local agency or appeal board pursuant to the ordinance or regulation. This follows because, as we have explained above, only if the ordinance or regulation would be invalid on its face or as applied unless compensation is paid to an affected landowner, is a claim in inverse condemnation meritorious. Therefore, the constitutional validity of the ordinance as it affects the plaintiff's property must be litigated in any

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[14] These concurring opinions include *Presenting Jamul v. Board of Supervisors*, 231 Cal.App.3d 665, 670-672 (1991); *Hunt v. County of Shasta*, 225 Cal.App.3d 432, 441 (1990); *Griffis v. County of Mono*, 163 Cal.App.3d 414 (1985); *Kirk v. County of San Luis Obispo*, 156 Cal.App.3d 453 (1984); *Soderling v. City of Santa Monica*, 142 Cal.App.3d 501 (1983); *Resource Defense Fund v. County of Santa Cruz*, 133 Cal.App.3d 800 (1982); *Camp v. Board of Supervisors*, 123 Cal.App.3d 334 (1981); *Kriebel v. City Council*, 112 Cal.App.3d 693 (1980); *Timberidge Enterprises, Inc. v. Santa Rosa*, 86 Cal.App.3d 873, 886-887 (1978).

> inverse condemnation action which does not allege that a taking has already been judicially established.
>
> Section 66499.37 mandates that: "***Any*** action or proceeding ***to attack, review, . . . the decision of an advisory agency, appeal board or legislative body concerning a subdivision,*** . . . or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations." (Italics added.)
>
> This section is not, as plaintiff argues, limited to actions for specific relief. It includes actions for compensation for a regulatory taking because the validity of the ordinance or its application to the plaintiff's property, if uncompensated, must be determined in the action – i.e., the court must determine if there has been a taking. Before he or she is entitled to any relief, either compensation or exemption of the property from the development restriction, the plaintiff must establish that the ordinance, regulation, or administrative action is not lawful or constitutionally valid if no compensation is paid. The action therefore comes within the broad language of section 66499.37.

Appendix A at A-29.

"Section 66499.37 was enacted to ensure that ***any*** challenge to local legislative or administrative acts or

decisions taken pursuant to ordinances enacted under the authority of the Subdivision Map Act will be brought promptly." Appendix A at A-2 (emphasis in original). There can be no doubt but that the California Supreme Court's holding was based upon its interpretation of the preclusive effect of Government Code § 66499.37, which is an adequate state ground, and not on any federal question.

B. The California Supreme Court's Abstract Of Regulatory Takings Jurisprudence Is Both Dicta And Correct

While Hensler asserts that the California Supreme Court has placed hurdles in the course of landowners seeking to recover compensation for an as applied regulatory taking, the Court's opinion correctly abstracts this Court's ripeness rule.[15] Because this issue is irrelevant

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[15] Nor does California law unfairly delay or cause unwarranted expense to the landowner under the California Court's ruling below. "As noted above, the inverse condemnation proceeding may be joined with the petition for writ of mandate. Thus, there is no extended delay, and, as the court held in *First Lutheran Church v. Los Angeles, supra,* 482 U.S. 304, the landowner is entitled to damages for any loss of use of the property beyond that to be expected as part of the normal permit process. Moreover, the expense of a meritorious taking claim will not be borne by the owner. Not only are damages for a temporary taking available, but the owner's reasonable costs and attorney fees must be reimbursed by the local entity if the owner establishes that the restriction on land use is a compensable taking. (Code Civ. Proc., § 1036; *Locklin* v. *City of Lafayette* (1994) 7 Cal.4th 327, 375-377; *Greater Westchester Homeowners Assn.* v. *City of Los Angeles* (1979) 26 Cal.3d 86, 104; *In re Development*

given the ruling below on the preclusive effect of Government Code § 66499.37, the City will not burden this Court with a point-by-point rebuttal to Hensler's claims. Instead, the City will offer a few summary comments.

Hensler creates a straw man by claiming that the California Supreme Court's opinion below requires a judicial writ of mandate action as a prerequisite to an inverse condemnation claim asserting a regulatory taking. Petition, at 15. In fact the unanimous opinion merely states that the 90 day statute of limitations of Government Code § 66499.37 applies regardless of the form of challenge brought by a landowner challenging a condition of subdivision approval.

> We conclude that an action in inverse condemnation, ***whether or not joined*** with an action in administrative mandamus (Code Civ. Proc., § 1094.5) challenging the ordinance or its application to the plaintiff's property, is governed by Government Code section 66499.37. . . .

Appendix A at A-1 (emphasis added).

Nor does the California Supreme Court's opinion below misstate the ripeness requirement. In *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held: "Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not

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Plan for Bunker Hill (1964) 61 Cal.2d 21, 71.)" Appendix A at A-14.

ripe." 473 U.S. 172, 186. This is exactly the holding that the California Court's ruling below promotes.

This Court strongly stated in *Williamson County*, 473 U.S. 172, 190-191, that the ripeness inquiry is "compelled by the very nature of" the Fifth Amendment.[16] As this Court held:

> As in *Hodel, Agins,* and *Penn Central,* then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City,* 438 U.S., at 123, 98 S.Ct., at 2659, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

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[16] Hensler fails to inform this Honorable Court that *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which Hensler relies upon as the basis of his claim that the opinion in the case at bar creates a "head on conflict" with federal decision law (Petition, at 15, n.9), has been fully explained and distinguished in *Williamson County, supra*, 473 U.S. at 192.

Thus, this Court has expressed the absolute need for a final determination in order for any court to be in a position to do its job.

Moreover, although the ripeness doctrine was developed in three 1980s United States Supreme Court decisions decided before this Court's decision in *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987),[17] this Honorable Court has continued to stress the ripeness requirement in its regulatory takings decisions issued after 1987. For example, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court refused to determine whether a provision of San Jose's rent control ordinance constituted a taking because the City had not yet finally applied the challenged provision to any landlord's application for a hardship rent increase. Only three terms ago, in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), this Court expressly held that the ripeness requirement "would preclude review" of the regulatory takings challenge to South Carolina's beachfront development restriction but for the fact that the South Carolina Supreme Court had expressly refused to rest its decision on ripeness grounds and "had shrugged off the possibility of further administrative and [state court] trial proceedings."[18] *Lucas, supra*, 112 S.Ct. at 2891.

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[17] *Williamson County, supra*, 473 U.S. 172; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981); and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). These cases followed this Court's first reference to the ripeness requirement in the context of regulatory takings in *Agins v. Tiburon, supra*, 447 U.S. at 260.

[18] For this reason, Hensler is wrong to assert that the petitioner in *Lucas* made a permissible election to admit validity and

Hensler commits further error in claiming that he did not have to challenge the condition establishing the Affected Property because the City's 1986 decision on Hensler's subdivision application came one year prior to this Court's decision in *First English, supra,* 482 U.S. 304.[19] Nothing in either the California or United States Supreme Courts' opinion in *Agins* prevented Hensler from filing an action for an administrative writ of mandate within 90 days of the City's subdivision approval in April 1986 to seek review of any condition of approval. Moreover, nothing in this Court's opinion in *Agins* prevented Hensler from seeking damages in such a case pursuant to Code of Civil Procedure section 1095.

Despite Hensler's assertions, this Court's decisions "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Lucas, supra,* 112 S.Ct. at 2891 (internal quotation marks and citations omitted). As this Honorable Court has perceptively observed: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates, supra,* 477 U.S. at 348. Hensler seeks to ignore the critical analysis performed by the California Supreme

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seek only damages. Petition, at 7. This Court simply stated that it was bound by the unchallenged ruling of the sovereign court of the State of South Carolina that the case was ripe for adjudication. *Lucas, supra,* 112 S.Ct. at 2891.

[19] Of course even if accepted, this argument does not explain why Hensler still waited over 2¼ years after this Court's 1987 decision in *First English* to file the instant action which is governed by a 90 day statute of limitations.

Court by the simple expedient of setting this Court's precedents on their head – giving the property owner and not the government the option of determining whether to pay damages for a ***permanent*** taking or whether to modify or rescind the offending regulation.[20]

C. Hensler's Ad Hominem Attack On The California Judiciary Is Unwarranted, And Fails To Assist The Principled Resolution Of The Issues Involved

Hensler's Petition sets out an undeserved, ad hominem attack on California's courts. Hensler's polemics do little to assist this Court in resolving the issue in controversy. The City will not burden the Court with a point-by-point refutation of Hensler's rhetorical excesses. Instead, the City offers a few brief observations.

First, one would think that quotation and citation to articles written ten, fifteen and even (in two instances) twenty years ago that attack the California courts would be recognized as inappropriate in denigrating a Supreme Court whose justices, with a single exception, were not members of the Court when these articles were written. Second, it is the California Legislature and not the courts which adopted and then halved the statute of limitations

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[20] Hensler's claim that a landowner need not seek a variance runs counter to this Court's statement in *Williamson County, supra*, 473 U.S. at 191, n. 12, that "it is impossible to determine the extent of the loss until the Commission has decided whether it will grant a variance from the application of the regulations."

set forth in Government Code § 66499.37. As the California Supreme Court's opinion held, the reason for the amendment reducing the statute of limitations to 90 days was not to harm landowners; rather, "the Legislature explained that changes in the law were needed to expedite the permit process and thereby encourage the development of new housing." Appendix A at A-28 to A-29, n.13. Third, short statute of limitations have been adopted by the California Legislature in many land use contexts, not simply in cases challenging subdivision related decisions.[21]

Hensler would be better served by focusing on the applicable case law, rather than isolated excerpts from the editorial writings of selected, long-time combatants in the California and national land use wars. An objective view of the cases from California and other jurisdictions reveals that the "conflict" Hensler posits between California and its other jurisdictions is a false one.

Space does not permit an encyclopedic recitation of the regulatory takings jurisprudence developed by the

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[21] "Section 66499.37 is not unique in establishing a requirement that challenges to the actions of an administrative agency be brought promptly. In addition to that section and Public Resources Code section 30801 [challenges to decisions of the California Coastal Commission – 60 days], the following statues establish such requirements: Code of Civil Procedure section 1094.5 (administrative mandamus – 90 days); Public Resources Code section 21167 (California Environmental Quality Act decisions – 30-180 days); Government Code sections 65901, 65903, 65907 – variances, conditional use and permits, board of zoning adjustment – 90 days) [sic]." Appendix A at A-34.

California courts relative to that articulated in other jurisdictions. Suffice it to say that an unbiased examination demonstrates California inverse condemnation decisions to be firmly within the constitutional mainstream developed by other state and federal courts. See, e.g., *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (Oregon Supreme Court found without merit post-Lucas regulatory takings challenge to municipal ban on development of privately-owned dry sand beach parcels); *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 855 P.2d 1027, *cert. denied*, 114 S.Ct. 684, 126 L.Ed.2d 652 (1994) (Nevada Supreme Court rejected regulatory takings challenge to regional land use plan, rebuffing landowner's narrow interpretation of "denominator" issue); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed.Cir. 1993) (accord, in federal wetlands regulation context); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 924, 127 L.Ed.2d 217 (1994) (property owner's regulatory takings claimed deemed to accrue, for purposes of applicable one-year statute of limitations, upon enactment of the challenged ordinance); *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2nd Cir. 1992), *cert. denied*, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993) (rejecting inverse condemnation challenge to state denial of land use permit based on perceived adverse impacts on wildlife); *Preseault v. United States*, 27 Fed.Cl. 69 (1992) (on remand from U.S. Supreme Court, Court of Federal Claims held that National Trails System Act effected no taking of private property); *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990) (municipal ordinance prohibiting development of portion of

undivided parcel does not trigger compensable taking of restricted segment).

Far from being "idiosyncratic" or "in complete disregard of landowners' constitutional rights"[22] (Petition, at 22), California state court regulatory takings precedents are altogether consistent with the majority of reported inverse condemnation decisions from other jurisdictions.[23] While this Court should deny Hensler's petition

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[22] While exhaustive citation to California published opinions is hardly warranted by Hensler's claims, a single citation will suffice. Any court system that authors opinions such as *Healing v. California Coastal Com'n*, 22 Cal.App.4th 1158 (1994) (cited with approval in the case below, Appendix A at A-15 to A-16), can hardly be said to be the court system "least likely to protect landowner rights." Petition, at 23. Indeed, *Healing* makes clear that, far from creating unnecessary procedural hurdles, California's system potentially allows aggrieved landowners such as Hensler two judicial "bites of the apple" in challenging conditions of permit approval; (1) an administrative mandate proceeding before a court which accords the landowner a *de novo* review on the record below or as augmented, and (2) a full blown court trial on an inverse condemnation claim. 22 Cal.App.4th at 1170; summarized in case below, Appendix A at A-15 to A-16.

[23] While Hensler points to two eight (8) year old decisions of this Court reversing a California appellate published and unpublished decision, respectively, he fails to note the more recent decisions of this Court affirming California court opinions in *Yee v. City of Escondido*, 112 S.Ct. 1522, 118 L.Ed. 153 (1992), and *Pennell v. City of San Jose, supra*, 485 U.S. 1. In *Yee* this Court held that the California courts' interpretation of regulatory takings jurisprudence in the context of mobile home rent control was correct while the rulings of the federal judiciary were in error (*e.g., Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988)).

because the California Supreme Court's unanimous opinion rests on an adequate state law grounds, this Court should not allow Hensler's high-flying rhetoric to sway this Court into anything less than full blown applause for the excellent précis of the ripeness requirement in the opinion below.

VI.

CONCLUSION

Hensler's attempt to seek certiorari is nothing more than a futile attempt to rewrite the last fifteen years of United States Supreme Court jurisprudence on the ripeness requirement. It should not be countenanced because: (1) this is the wrong case in which to attempt such an effort – the California Court's decision rests on adequate state grounds, its interpretation of Government Code § 66499.37; and (2) as the California Supreme Court noted, to do so would impermissibly shift the "option of exempting the property from the ordinance or regulation, or even repealing the ordinance as an alternative to paying compensation for a permanent taking" from the city to the landowner.[24] Appendix A at A-9.

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[24] In making this statement, the California Court relied upon the following pronouncement of this Court in *First English, supra*, 482 U.S. at 319:

> Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function. . . . Once a court determines that a taking has occurred, the government retains the whole range of options already

For all the foregoing reasons, the City respectfully submits that this case clearly does not warrant review by this Honorable Court. The City urges this Honorable Court to deny Hensler's petition for a writ of certiorari.

Respectfully submitted,

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FREILICH, KAUFMAN, FOX & SOHAGI
Attorneys for Respondent
City of Glendale

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available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

App. 1

No. S032210

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Mar. 23, 1994)

R.R. HENSLER, Appellant

v.

CITY OF GLENDALE, Respondent

The application of Defenders of Property Rights for permission to file an amicus curiae brief in support of Appellant is hereby denied. The issue to be argued is outside the scope of issues on which review was granted.

LUCAS
Chief Justice

No. 94-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

R.R. HENSLER,

Petitioner,

v.

CITY OF GLENDALE,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

THE NATIONAL ASSOCIATION OF HOME BUILDERS' MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-1124

R.R. HENSLER,

Petitioner,

v.

CITY OF GLENDALE,

Respondent.

On Petition for Writ of Certiorari
To The California Supreme Court

THE NATIONAL ASSOCIATION OF HOME BUILDERS' MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The National Association of Home Builders ("NAHB") moves this Court for leave to file this accompanying brief amicus curiae in support of petitioner. The NAHB has received the written consent of petitioner and has filed the letter of consent with the Clerk of this Court. The respondent City of Glendale has declined NAHB's request for consent to file a brief in support of the Petition.

INTEREST OF THE AMICUS CURIAE

The NAHB represents 180,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has been before this Court either as an amicus curiae in support of, or as of counsel on behalf of, the property owner in prior "takings" cases involving governments' land use decisions. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Nollan v. California Coastal Commn., 483 U.S. 825 (1987);[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v.

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[1]The NAHB brief was cited approvingly in this Court's Nollan opinion, 483 U.S. at 840.

Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this amicus and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. In this action, the California Supreme Court has erected a senseless procedural roadblock to property owners presenting federal Fifth Amendment claims which will have the effect of preventing the pursuit of these claims. In so doing, the California Supreme Court has so departed from this Court's prior takings jurisprudence that this Court's intervention is necessary.

The NAHB's interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on constitutional guarantees. As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when government's purposes are

> beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[2]

The NAHB sincerely believes that the accompanying brief will assist the Court in making its decision whether to grant plenary review of the issues presented in the Petition. The NAHB's concerns are much broader than those of petitioner since its members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses his arguments on the harm the City of Glendale inflicts on his concerns, the NAHB's brief addressess the broader public policy reasons why plenary review should be granted.

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[2]Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

For the above reasons, this Motion should be granted.

Respectfully submitted,

/s/ Glen Franklin Koontz
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January 20, 1995

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INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The California Supreme Court's decision constructs a senseless procedural roadblock in the paths of property owners seeking to enforce their federal Fifth Amendment rights. This decision so radically departs from this Court's prior takings jurisprudence that this Court's intervention is necessary so as to ensure the proper, fair and consistent administration of federal Fifth Amendment rights in the State of California.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment necessarily presumes that public property may be lawfully appropriated by government for public use. See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2890 (1992); Nollan v. California Coastal Commn., 483 U.S. 825, 831-32 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-315 (1987); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 297, n. 40 (1981); Hurley v. Kincaid, 285 U.S. 95, 104 (1932); Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893);

United States v. Jones, 109 U.S. 513, 518 (1883). The Fifth Amendment is clearly "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English, 482 U.S. at 315. Thus, given the clarity of this Court's jurisprudence with respect to this issue, the California Supreme Court's requirement that a property owner challenge the validity of a city ordinance before seeking compensation for an inverse condemnation is inexplicable.[1]

The petitioner filed his action pursuant to, inter alia, the United States Constitution, Amendment Five, seeking damages from the City of Glendale ("City") due to a regulatory taking of approximately 40% of his property.[2] Petitioner did not challenge the validity of the City's actions; rather, petitioner conceded lawfullness.[3] In so doing, petitioner proceeded exactly as did David Lucas.[4] The California Supreme Court, however, denied petitioner's claim on the basis that petitioner failed to challenge the validity of the City's ordinance. As stated in the opinion:

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[1]See Petition for Writ of Certiorari, Appendix A at A31-32.

[2]See Petition for Writ of Certiorari at 3-4. The value of this portion of petitioner's property is approximately ten million dollars ($10,000,000.00). Petition for Writ of Certiorari, Appendix A at A20, fn. 8.

[3]Id.

[4]See Lucas, 112 S.Ct. at 2890.

> The gravamen of plaintiff's cause of action is therefore a claim that the Glendale ordinance is invalid on its face or as applied . . . Plaintiff cannot transform the action into one which does not challenge the validity of the ordinance, regulations, and administrative actions by acquiescing in the taking, assuming the validity of those actions, and seeking only damages.[5]

This decision erects a senseless procedural roadblock in petitioner's path.[6] More importantly, it is likely to seriously erode the constitutional protections afforded by the Fifth Amendment to the citizens of California. Indeed, it defies common sense.

The California Supreme Court's reasoning is as suspect as its result. First, the California Supreme Court claims--without any supporting authority--that a property owner, prior to asserting a federal Fifth Amendment claim, must first:

> [A]fford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction

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[5] See Petition for Writ of Certiorari, Appendix A at A31-32 (emphasis added).

[6] A roadblock which is fatal to petitioner's case since the statute of limitations for challenging the City's ordinance is 120 days. Presumably, this is why the City was so eager to claim that petitioner was obligated to challenge the ordinance's validity. It is not clear why the California Supreme Court would countenance such an argument.

> once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking.[7]

Presumably, the California Supreme Court gleaned this idea from this Court's First English and Lucas decisions.[8] These decisions do not, however, support the California Supreme Court's holding. Indeed, contrary to the California Supreme Court's claim, these decisions upon which petitioner relied "do . . . support his thesis that the only precondition to a suit for compensation is administrative application of the ordinance restricting development of his property."[9] See also Williamson County, 473 U.S. at 186.

Second, the California Supreme Court arrogantly proclaims--again without any supporting authority--that the "procedural requirements to which plaintiff objects do no more than ensure to the state its right to a prepayment judicial determination that the ordinance or regulation is excessive and will constitute a taking . . . ."[10] The NAHB respectfully submits that states do not have "rights"; rather, individuals have rights. Indeed, a careful examination of the United States Constitution fails to uncover any instance of the granting of "rights" to a government. Assuming arguendo,

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[7]See Petition for Writ of Certiorari, Appendix A at A12.

[8]See Petition for Writ of Certiorari, Appendix A at A8-10.

[9]See Petition for Writ of Certiorari, Appendix A at A10.

[10]See Petition for Writ of Certiorari, Appendix A at A20 (emphasis added).

that states do have rights, the California Supreme Court declined to identify its authority for this asserted right, perhaps because there is no authority for this proposition.

Third, and finally, the California Supreme Court reasons that this procedural requirement is necessary because "[f]ew local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property."[11] This rationale is without merit. A municipality must obey the United States Constitution irrespective of its financial condition. See Watson v. Memphis, 373 U.S. 526, 537 (1963). See also Penn Central Transportation Co. v. New York, 438 U.S. 104, 152-153 (1978) (Rehnquist, J., dissenting, citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). Indeed, as petitioner so astutely points out, "[i]f the harm so inflicted is economically burdensome to cities, it is a fortiori devastating to the individual victims.[12] The NAHB submits that the Fifth Amendment is clear as to upon whom should fall this economic burden.

CONCLUSION

If the Fifth Amendment's takings clause means anything, this decision cannot stand. The procedural roadblock that the California Supreme Court has placed in the path of property owners seeking compensation pursuant to the Fifth Amendment runs contrary to the Constitution's plain

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[11]Id.

[12]See Petition for Writ of Certiorari at 17.

meaning, as well as the totality of this Court's takings jurisprudence. Therefore, for the reasons stated above and in the Petition for Writ of Certiorari, the NAHB prays that this Court issue a writ of certiorari to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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January 20, 1995

(4)

No. 94-1124

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

R. R. HENSLER,

Petitioner,

vs.

CITY OF GLENDALE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The doctrine of "adequate and independent state grounds" behind which respondent City of Glendale (the City) seeks to hide, has no relevance to this case. If nothing else, the court below was explicit that it meant to decide, and did decide, dispositive federal constitutional issues. See Pet. Appendix A (the Opinion).

This is a case of compelling public importance. The Opinion prescribes a regimen to which all California property owners seeking just compensation in land use regulation cases will hereafter be required to conform which, with respect, defies the law of this Court. It is an invitation to courts in other jurisdictions to similarly eviscerate this Court's constitutional law.[1]

One would be hard pressed to discern from Respondent's Brief in Opposition (Opp.) that this is an appeal from a judgment of dismissal following the sustaining of a general demurrer without leave to amend — a procedure which creates a factual record of only the complaint and matters judicially noticed *at the trial court level* (Cal. Code Civ. Proc. § 430.70).[2]

---

[1] This Court need not rely on Petitioner's representation. The first published appellate decision in California explicating the Opinion — aside from a passing reference in *Cohan v. City of Thousand Oaks*, 30 Cal.App.4th 547, 554 (1994) — refused to apply it retroactively because that would undermine reasonable reliance on pre-existing law. *Del Oro Hills v. City of Oceanside*, ___ Cal.App.4th ___, 1995 Cal.App. LEXIS 50, 1995 WL 29407 (No. D017139, Jan. 23, 1995).

[2] When this case was pending below, the City attempted to thrust upon the court of appeal large chunks of improper extra-record material. The submission was ordered stricken (see Appendix F hereto). The same gambit was attempted before the Supreme Court of California, with the same result (see Appendix G hereto).

(continued)

The City's brief does not challenge these central points of Petitioner:

(1) that the City's Ordinance No. 4533 (the Ordinance) flatly prohibits any "man-made features" whatever on a 140-acre tract (see Pet. 3-4);

(2) that the Opinion presents a revisionist deconstruction of both its own and this Court's jurisprudence (see Pet. 19-22);[3]

(3) that the asserted economic condition of local governmental entities — the underlying policy justification for the procedural obstacle course constructed by the Opinion — is manifestly an improper basis for granting or withholding rights secured by the United States Constitution (see Pet. 17-18); and

(4) that the Opinion repackages the overruled *Agins I* opinion in an effort to accomplish indirectly what this

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(fn. continued)
Unchastened and apparently in the grip of some inexorable obsession, the City again offers an extended recital based on this *dehors* the record material. (Opp. 4-9) But even if this court should consider this flagrantly improper material, much of it *ipse dixit*, the City would not be aided: the bulk of it is simply irrelevant.

[3] The City notes, misleadingly, that "nothing in this Court's opinion in *Agins* [*Agins v. City of Tiburon*, 447 U.S. 255 (1980) (*Agins II*)] prevented Hensler from seeking damages in such a case pursuant to Code of Civil Procedure section 1095." (RB 23) But it is the California Supreme Court's *Agins v. City of Tiburon* opinion, 24 Cal.3d 266, 269-70 (1979) (*Agins I*), as distinguished from this Court's *Agins II* opinion, that flatly precluded damages for unconstitutional land use regulation. *Agins I* was the law in California until overruled by this Court in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). And until the California Supreme Court suggested the contrary in the Opinion, it was firmly established that such damages were *never* available in a section 1095 action (see Pet. 22 n.17) — no case in California history has ever awarded them.

Court has ruled cannot be done directly: preclude California property owners from ever securing just compensation for regulatory takings.

I

THE DOCTRINE OF ADEQUATE AND INDEPENDENT STATE GROUNDS DOES NOT INSULATE THE CALIFORNIA SUPREME COURT DECISION BELOW FROM REVIEW BY THIS COURT

As for the City's reliance on the doctrine of "adequate and independent" state grounds, "[a] state ground is 'adequate' where the judgment would have to be upheld even if the federal ground were reversed; . . . A state ground is 'independent' where its resolution is not tied to federal issues in the case," (Laurence H. Tribe, *American Constitutional Law*, § 3-24 p. 163 (Foundation Press, 2d ed. 1988)), or where resolution of the federal question "cannot affect the judgment." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). But here, resolution of the federal question will result in setting aside the judgment. If, for example, this Court finds that Petitioner may accept the validity of the regulation but seek damages because of its confiscatory impact, as did the plaintiff in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798, 824 (1992), reversal would follow[4] because then recourse to the multiple

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[4] Until the Opinion suddenly tied the Subdivision Map Act limitations period to inverse actions (a linkage never previously made in the Act's 50-year history), the controlling limitations statute was five years. Code Civ. Proc. § 319. Petitioner was entitled to rely in this law. *See Hughes v. Washington*, 389 U.S. 290, 295-98 (1967) (Stewart, J., concurring). This is the short answer to the City's

(continued)

administrative and judicial review proceedings would not be necessary. The same is true of the state court's disregard of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). (See Pet. 11-15)

Further, the California Supreme Court used the Opinion as a vehicle for a grand *pronunciamento*, delivering a holding as to how all land use cases presenting alleged violation of federal constitutional rights should be treated prospectively in California.[5]

This necessarily raises larger issues. "While it may be completely appropriate for California to condition rights which grow out of local law . . . California may not impair federally created rights or impose conditions upon them." *Willis v. Reddin*, 418 F.2d 702, 704-05 (9th Cir. 1969); see also quoted material from this Court to the same effect at Pet. 26; *Cooper v. California*, 386 U.S. 58, 62 (1976); and *People v. Brisendine*, 13 Cal.3d 528, 549 (1975). The Constitution of the United States *is* the supreme law of the land. Even in California. (Cal. Const. art. III, § 1).

(fn. continued)
rhetorical musing (Opp. 23 n.19) as to why Mr. Hensler waited until two years and three months after *First English* before filing his action.

[5] The City asserts that Petitioner failed to claim that Government Code §66499.37 effected a constitutional taking of his property, and that he "only litigated [state court issues] below and raised no federal issues." (Opp. 2, 9) This claim is false; the complaint *expressly* pleaded that the enactment of the Ordinance and subsequent actions based thereon "constituted a compensable taking by defendant City under Article 1 § 19 of the California Constitution, *and the Fifth and Fourteenth Amendments to the Constitution of the United States*." (CT 3:26-27) (emphasis added) The federal constitutional claims have been central in this case from its birth, and it is disingenuous of the City even to suggest otherwise.

II

ISSUE IS JOINED TO FORM A COMPELLING QUESTION OF IMPORTANCE: ARE THE MULTIPLE BARRIERS TO THE RIGHT OF JUST COMPENSATION CREATED IN THE OPINION BELOW PERMISSIBLE UNDER THE LAW OF THIS COURT?

The City defends the Opinion as a garden variety ripeness case (*e.g.*, Opp. 19), purporting to rely on *Williamson County*. But the Opinion defies *Williamson County* — it manufactures several procedural steps which are plainly designed as obstacles to relief. *Williamson County* held those *not* to be required. (See Pet. 14-16)

Issue is thus joined on a central question presented in the Petition: may state courts substitute their own procedural prerequisites to the availability of self-enforcing federal constitutional guarantees, so as to nullify those enumerated in *Williamson County*?

While the City is correct in noting that *Williamson County* requires ripeness in the form of an administrative "final decision" (Opp. 20), it engages in clumsy evasion of how this Court defined and circumscribed the quoted term. *Williamson County* could not be plainer in pointing out that "finality," as used in this context, requires no pursuit of either nonmonetary administrative or judicial remedies: it is the final regulatory action, not administrative or judicial reviews thereof, that mark the point at which a property owner may seek damages in state courts. 473 U.S. at 192-93.

Nor can the City sidestep *Williamson County* by asserting that pursuant to the Opinion a petition for writ of

mandate may be joined with a complaint in inverse condemnation. (See, *e.g.*, Opp. 19 n.15, 20.) One pleading may indeed be filed, but the two remedies are distinct. Each must be tried separately (*Residents of Beverly Glen, Inc. v. City of Los Angeles*, 275 Cal.App.2d 732 (1969)); adjudication of the writ petition still leaves the complaint to be adjudicated. However sliced, the procedure constructed below still adds up to at least four court proceedings and three administrative proceedings with multiple hearings in each (see Pet. 15-16) — an unconscionable and unnecessary burden[6] created by the courts of a state traditionally hostile to the payment of just compensation in land use cases (but precluded by *First English* from denying it outright).[7]

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[6] The suggestion below that this litigational maze is required to give a regulating entity the opportunity for rescission if a regulation is found confiscatory is a pretext, because a government entity in California, as elsewhere, has always been free to amend or repeal a regulation (see Pet. 13; and see language of this Court to that effect quoted by the City at Opp. 28-29 n.24). The City speaks out of both sides of its mouth on this issue.

[7] The City attempts several gambits in an effort to evade the harshness of the regimen prescribed in the Opinion. The following are representative:

First, it attributes to Mr. Hensler a position he has never taken, claiming that he would deny a public entity the power to rescind or modify an offending regulation. (Opp. 25) But, as noted *ante*, that right is always present.

Second, the City states (Opp. 19 n.15) that should a property owner prevail in an inverse condemnation land use action, that owner could recover fees and costs. Not so. Only trial fees and costs are claimable; not reimbursable are the onerous owner expenditures (carrying costs of useless land for years, front money and other outlays) required by the administrative proceedings, nor fees and costs from the inevitable appeals, or the writ proceedings that often arise. *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 658-59 (1976).

(continued)

More importantly, the City ignores the "Catch-22" conundrum presented. Since the Opinion sanctions a harsh 90-day limitations bar on actions seeking damages as well as petitions seeking invalidation (Opinion at A29-30), California owners are told that to recover just compensation they must:

(1) file an action for damages within that 90-day period; *and also*

(2) "ripen" the case through the prescribed "exhaustion" procedures (*i.e.*, administrative appeals, variance applications, submission of multiple development plans, etc.), though obviously none of that can possibly be achieved in 90 days — nor within the one-year limitation period controlling 42 U.S.C. § 1983 actions either.

Thus, the City *de facto* argues that (1) a lawsuit complying with the 90-day limitations requirement will be unripe and therefore subject to dismissal, and (2) an appropriately ripened action will necessarily be time-barred. A property owner can thus be premature, or tardy, or simultaneously premature and tardy, *but apparently never timely*.[8] With all due respect, this is

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(fn. continued)

Third, the City attempts to negate a central pillar of *Lucas*. This Court's recognition of a citizen's right to seek damages rather than invalidation as a remedy (inconsistent with the Opinion), by attempting to transmogrify it into a matter of local (South Carolina) law. Not so. *Compare* Opp. 22-23 n.18 with *Lucas*, 120 L.Ed.2d 808-11.

[8] And a further problem exists: Californians cannot even look forward to the chance to present their claims to a federal court at the end of the state proceedings under *Williamson County*. The Ninth Circuit has interpreted *Williamson County* in juxtaposition with *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980) and other cases, so as to give *res judicata* effect to the state court proceedings (continued)

not principled jurisprudence; it is a "gotcha" game relegating the just compensation clause to "poor relation" status beyond the pale of the Bill of Rights. *Compare, Dolan v. City of Tigard*, 512 U.S. ___, 129 L.Ed.2d 304, 321 (1994).

There is no doubt that California has thus far enjoyed striking success in its efforts to frustrate application of this Court's *First English* jurisprudence. No reported appellate decision affirming or requiring just compensation for unconstitutional regulation has been issued in California, the nation's most populous, litigious and probably most highly regulated state, in at least thirty years. And commentators continue to decry California's uniquely harsh treatment of aggrieved landowners.[9]

(fn. continued)
Williamson County requires. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 127 L.Ed.2d 373 (1994). The essence of this rule is that the very moment a federal case becomes ripe it ceases to exist. A recent district court decision held that the landowner was precluded "from ever pursuing its federal claim in federal district court. Thus, the plaintiff asserting a taking in violation of the United States Constitution will never gain redress in the federal courts, unless, of course, it successfully petitions the United States Supreme Court for a writ of certiorari." *Hayward Exchange, Inc. v. City of Oakland*, 1994 WL 46841, *4, 1994 U.S. Dist. Lexis 1421, *11 (N.D. Cal. 1994), *appeal pending*. Query: did this Court intend *Williamson County* to produce so anomalous a result?

[9] The City cannot undercut this justified criticism (which emanates not from Petitioner, as the City states at Opp. 24, but from numerous disinterested observers) by collecting the most draconian cases it can find from other jurisdictions and presenting them as a legitimate cross-section of state decisions in this area. (AOB 26) It is revealing, to say the least, that in its efforts to prove that California law is in the mainstream, *all* of the cases it selects are cases in which property owners got nothing.

(continued)

The City's response to all of this? It wants this Court to respond with "full blown applause." (RB 28)

Things do get a little surrealistic in this area of the law in California.

(fn. continued)

Nor can the City defuse this criticism by finding a couple of instances in which this Court has sustained California Court rulings. (The City's choice of *Pennell v. City of City of San Jose*, 485 U.S. 1 (1988) as an exemplar is astonishing, since *Pennell* held that a facial challenge mounted after an objectionable regulation is enacted is unripe, and the property owner must wait until an actual controversy over the regulations application is presented — *exactly the opposite of what the Opinion holds. Id.* at 11.)

Nor can it ameliorate the criticism by presenting one case, *Healing v. California Coastal Comm'n*, 22 Cal.App.4th 1158 (1994), in which a property owner prevailed. All *Healing* proves is that some cases are so outrageous that even in California some relief may be available. In *Healing*, the Coastal Commission refused for 17 years to issue a development permit because the local Environmental Review Board had not acted on the permit, even though no such board existed — in other words, where compliance was impossible. *Id.* at 1163-65, 1179.

More representative than *Healing* of California courts' attitude is the fate of *Ehrlich v. Culver City*, 15 Cal.App.4th 1737 (1993). When it decided *Dolan*, this Court vacated that opinion (129 L.Ed.2d 854 (1994)), ordering reconsideration in light of *Dolan*, with which *Ehrlich* was obviously inconsistent. On December 23, 1994, the California Court of Appeal reissued its *Ehrlich* opinion (now unpublished), virtually unchanged except for a couple of new paragraphs cavalierly brushing aside *Dolan* as essentially inapplicable, and reaching the same result.

Nor can the City negate the broad-based criticism of California's anomalous law by pointing out that not all the critical material is new (much is: one book and one article bear 1993 dates; most date from the 1980's). A new book reaching the same conclusion is William A. Fischel, *Regulatory Takings and Local Self-Governance: Economic and Political Alternatives to Constitutional Adjudication* (Harvard Univ. Press), publication expected in 1995.

Presenting a paper at an ABA seminar entitled "*Property Rights: Are There Any Left?*," Robert H. Freilich dismissed this Court's decision in *First English* as unimportant by predicting that "[s]tate and federal courts will emasculate what the Supreme Court held . . . ." Berger, *Happy Birthday, Constitution*, 20 Urban Lawyer 735, 744 n.50 (1988). These words proved prophetic in California, and now Mr. Freilich (one of the City's counsel) invites this Court to applaud the emasculation of its own law.

The Catch-22 posture of federal constitutional law, as seen through California's distorted prism, is no more and no less than this: Californians who sue promptly upon enactment of confiscatory regulations are told by this Court in *Pennell* that their suit is premature. But when they comply with *Pennell*, they are told by the Opinion that their suit is time-barred. Surely, this cannot be constitutional law.

CONCLUSION

Petitioner prays that certiorari be granted.

DATED: February 6, 1995.

Respectfully submitted,

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APPENDIX F

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL
- SECOND DIST.
FILED
OCT 18 1991
Robert N. Wilson Clerk
R. Taylor
Deputy Clerk

R. R. HENSLER,
Plaintiff and Appellant,
v.
CITY OF GLENDALE,
Defendant and Respondent.

No. B052246
(Super.Ct.No. NCC 41335)
(Joseph R. Kalin, Judge)

ORDER

THE COURT:*

We have read and considered appellant's motion to strike respondent's brief, filed on September 24, 1991, and respondent's opposition thereto, filed on October 11, 1991.

An appeal must be decided on the record of the proceeding which occurred in the trial court. (*People v. Wein* (1958) 50 Cal.2d 383, 411.) In this case respon-

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* WOODS (A.), P.J.

dent relies on documents which were neither before the trial court nor considered by it.

Accordingly, we grant appellant's motion. Further, we decline respondent's request that we take judicial notice of the documents. Respondent shall have 30 days from the date of this order within which to resubmit its brief, deleting any reference to the documents which were attached to its brief as Exhibits A and B, and the exhibits themselves.

Appellant's reply brief shall be due 20 days after the filing of respondent's brief.

APPENDIX G

No. S032210

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
FEB 24 1994
Robert Wandruff Clerk
/s/
Deputy

R. R. HENSLER, Appellant,
v.
CITY OF GLENDALE, Respondent.

Respondent's request that the court take judicial notice of Ordinance No. 4533 of the City of Glendale is granted. Respondent shall resubmit an authenticated copy of the ordinance. The request is denied in all other respects.

Appellant's motion to strike the exhibits to respondent's request for judicial notice is granted.

The denial in part of the request to take judicial notice is without prejudice to resubmission of the request as limited to materials shown to be proper subjects of judicial notice under Evidence Code section 459, and which are both relevant to Government Code section 66499.37 and shown to have been before the Legislature prior to the adoption of Government Code section 66499.37. (See Harris v. Capital Growth Investors XIV

(1991) 52 Cal.3d 1142, 1157, fn.6; California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 701. See also, Grupe Development Co. v. Superior Court (1993) 4 Cal.4th 911, 922; Delaney v. Superior Court (1990) 50 Cal.3d 785, 801, fn.12.)

Any further request for judicial notice shall identify and authenticate *each* item, explain the relevance of *each* item to an issue in this proceeding, and state the authority both for judicial notice of the item and for consideration of each as legislative history.

/s/ LUCAS
Chief Justice